

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/335277630>


Handbook on Prison Pre-trial Detainee Law Clinic

Book · August 2019

CITATIONS


4

7 authors, including:

 **Ernest Ojukwu**
Baze University Abuja
14 PUBLICATIONS 12 CITATIONS
[SEE PROFILE](#)

READS

572

 **Yemi Akinseye-george**
Nasarawa State University
1 PUBLICATION 4 CITATIONS
[SEE PROFILE](#)

HANDBOOK ON PRISON PRE-TRIAL DETAINEE LAW CLINIC

HANDBOOK ON PRISON PRE-TRIAL DETAINEE LAW CLINIC

Ernest Ojukwu et. al.

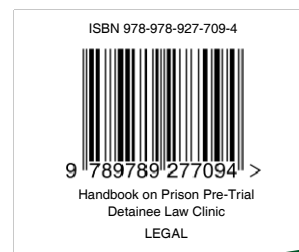
This Handbook on Prison Pre-trial Detainee Law Clinic has been written to provide a guide to law teachers and law students working in a Prison Pre-trial Detainee Law Clinic or other criminal justice, human rights and access to justice projects and programmes in Nigeria.

The Handbook provides a basic text for training law teachers, students and supervisors in a prison, human rights, access to justice and criminal justice clinic or programme.

It is based on the curriculum written for the academic component of prison pre-trial law clinics and covers the following themes: Objectives and Scope of a Prison Pre-trial Detainee Law Clinic; The Nigerian Criminal Justice System; Procedure for Instituting Criminal Proceedings; An overview of the Human Rights of Prisoners/Pre-trial Detainees in Nigeria; Access to Justice; Role of Law Clinics in Prison and Pre-trial Detention; Professional Responsibility and Ethics; Interviewing and Counselling at Prison Pre-trial Detainee Law Clinic; Report and Opinion Writing; and File Management.

Teachers and students will find this handbook (as well as the Manual on Prison Pre-trial Detainee Law Clinic that supports it) very useful. The Handbook is written by experienced clinicians in Nigeria. We thank The John D. and Catherine T. MacArthur Foundations and Justice Initiative for supporting the publication of this book.

N U L A I
N I G E R I A
Network of University Legal Aid Institutions



Ernest Ojukwu et.al.

**HANDBOOK ON PRISON PRE-TRIAL
DETAINEE LAW CLINIC**

This publication was supported with funds from



And



Open Society Justice Initiative

**HANDBOOK ON
PRISON PRE-TRIAL
DETAINEE LAW CLINIC**

**Ernest Ojukwu
Yemi Akinseye-George, SAN
Isa Hayatu Chiroma
Sam Erugo; Idorenyin Eyo
C.K. Nwankwo; Amari Omaka**

**N U L A I
N I G E R I A**

Network of University Legal Aid Institutions

Abuja

NULAI Nigeria

Published by

Network of University Legal Aid Institutions
(NULAI Nigeria)
Suite 9A 2nd Floor City Plaza
Plot 596 Ahmadu Bello Way
Garki II Abuja
P.M.B. 274 Area 10 Garki Abuja
Tel, +234-9-290 0609; 803-7877095
www.nulai.org

ISBN: 978-978-932-354-8

Copyright © 2012 by Network of University Legal Aid Institutions
(NULAI Nigeria)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of NULAI Nigeria.

CONTENTS

| | | |
|--------------------------|--|-----|
| About the Authors | | vi |
| Preface | | vii |
| Chapter 1 | - Objectives and Scope of a Prison Pre-trial Detainee Law Clinic | 1 |
| Chapter 2 | - The Nigerian Criminal Justice System | 3 |
| Chapter 3 | - Procedure for Instituting Criminal Proceedings | 29 |
| Chapter 4 | - An overview of the Human Rights of Prisoners/Pre-trial Detainees in Nigeria | 87 |
| Chapter 5 | - Access to Justice | 121 |
| Chapter 6 | - Role of Law Clinics in Prison and Pre-trial Detention | 153 |
| Chapter 7 | - Professional Responsibility and Ethics | 177 |
| Chapter 8 | - Interviewing and Counselling at Prison Pre-trial Detainee Law Clinic | 199 |
| Chapter 9 | - Report and Opinion Writing | 207 |
| Chapter 10 | - File Management | 213 |
| Index | - Index | 221 |

ABOUT THE AUTHORS

Ernest Ojukwu

Deputy Director-General and Head, Augustine Nnamani Campus, Nigerian Law School; President Network of University Legal Aid Institutions (NULAI Nigeria); Formerly Associate Professor and Dean, Faculty of Law Abia State University Uturu, Nigeria

Yermi Akinseye-George

Senior Advocate of Nigeria; Professor of Law Nasarawa State University, Keffi; Secretary Network of University Legal Aid Institutions (NULAI Nigeria); Formerly Dean Faculty of Law, Adekunle Ajasin University, Akungba

Isa Hayatu Chiroma

Professor of Law; Deputy Director-General and Head Yola Campus, Nigerian Law School; Vice-President Network of University Legal Aid Institution (NULAI Nigeria); Formerly Dean and Coordinator Faculty of Law/Unmaid Law Clinic, University of Maiduguri

Sam Erugo, PhD

Coordinator ABSU Law Clinic; Head Department of Jurisprudence, International and Public Law, Abia State University Uturu

Idorenyin Eyo (Mrs)

Coordinator UniUyo Law Clinic; Lecturer Faculty of Law University of Uyo

C. K. Nwankwo, PhD

Senior Lecturer Abia State University Uturu

Amari Omaka

Professor and Dean Faculty of Law Ebonyi State University Abakaliki; Director EBSU Law Clinic

PREFACE

This *Handbook on Prison Pre-trial Detainee Law Clinic* has been written to provide a guide to law teachers and law students working in Prison Pre-trial Law Clinics or other criminal justice, human rights and access to justice projects and programmes in Nigeria.

The Handbook provides a basic text for training law teachers, students and supervisors in a prison, human rights, access to justice and criminal justice clinic or programme.

It is based on the curriculum written for the academic component of prison pre-trial law clinics and it covers the following themes: Objectives and Scope of a Prison Pre-trial Detainee Law Clinic; The Nigerian Criminal Justice System; Procedure for Instituting Criminal Proceedings; An overview of the Human Rights of Prisoners/Pre-trial Detainees in Nigeria; Access to Justice; Role of Law Clinics in Prison and Pre-trial Detention; Professional Responsibility and Ethics; Interviewing and Counselling at Prison Pre-trial Detainee Law Clinic; Report and Opinion Writing; and File Management.

Teachers and students will find this handbook (as well as the *Manual on Prison Pre-trial Law Clinic* that supports it) very useful. The Handbook is written by experienced clinicians in Nigeria. We thank *The John D. and Catherine T. MacArthur Foundation* and *Justice Initiative* for supporting the publication of this book.

Ernest Ojukwu
October 2012

CHAPTER 1

Objectives and Scope of a Prison Pre-trial Detainee Law Clinic

OUTCOMES

Explain the objectives and scope of the Prison Pre-trial Law Clinic.

OBJECTIVES

The main reason for introducing clinical legal education is to train law students to become competent, community service conscious and ethical lawyers. A law clinic provides the platform for the academic and service components of this goal.

A specialised prison pre-trial law clinic further provides an opportunity to:

- i. develop the skills of law students to complement official legal aid with free legal services to Prisoners and pre-trial detainees; and
- ii. Promote students' commitment to public interest lawyering and community service.

A Prison clinic could focus on any of the following thematic issues:

- i Prisoners' Welfare;
- ii Prisoners' human rights education especially on rights and responsibilities;
- iii Prisoners' general education and career development;
- iv Data verification and collection;
- v Women Prisoners;

- vi Juveniles in prison;
- vii Prison decongestion;
- viii Pre-trial detainees.

The focus of a pre-trial detainee law clinic should be to give the detainees access to justice.

The main problem of a detainee is that he/she is being detained either without trial or with a slow pace of trial. It is important that any person accused of any crime is given an opportunity to determine his/her guilt or innocence at the earliest opportunity even as the constitution presumes the innocence of every person accused of crime. It will serve the interest of justice and conform to civilized standard if the legal process provides an early opportunity for hearing all sides of a case. It is an abuse of all known rules of human rights to keep a person in detention without trial for an indefinite and unpredictable length of time.

At a Prison Pre-trial Detainee Law Clinic, the student will be exposed to the actual workings of the administration of justice processes. The student will see and experience the prison and be in a position to reflect on its structure, management, administration and legal framework. Students who work in the prison have the potential of being change agents. In a short time after graduation some of them may become police officers, prison officers, magistrates, judges, State Counsel, Director of Public Prosecutions, Attorneys-General, Governors, Legislators, legal practitioners, officers of other law enforcement agencies.

The students after working in a prison pre-trial detainee law clinic will also be better skilled. Working at a prison law clinic will help a student develop several lawyering skills and values including writing, drafting of court processes, advocacy skills, interviewing, counselling, report writing, team work, inter-personal skills, community service, etc.

CHAPTER 2

The Nigerian Criminal Justice System

OUTCOMES

- (i) Discuss and explain the nature, scope and concept of the Nigerian criminal justice system.
- (ii) Identify and discuss the institutions involved in the Nigerian criminal justice system.
- (iii) Explain the Laws, Rules and other Instruments regulating Criminal proceedings in Nigeria.

2.1 INTRODUCTION

One of the most important tools available to society for the control of anti-social behaviour is the criminal justice system. It is one of the indices for measuring the success of every government and to be accorded that self-reliant status that developing nations desperately seek to achieve. The system envisages at least three components, namely, law enforcement, judicial process and reformatory institutions such as the prison.

The aim of an effective criminal justice system should be to strike a balance between punishing the guilty and protecting the innocent. According to Elliot¹ our systems of investigation need safeguards which prevent the innocent being found guilty, but those safeguards must not make it impossible to convict those who are guilty.

¹ Elliot, C and Quinn F.,(2002), *The English Legal System*, England, Pearson Education Ltd., p.239

This balance has been the subject of debate in recent years. To balance these interests requires working with different types of institutions and actors such as the police, courts, prosecutors, customs officers, social workers, prison officials, community leaders, paralegals, traditional councils and other local arbitrators and law enforcement agencies.

In the criminal justice administration there are three distinct stages of a citizen's contact with the system. These are the pre-trial, trial and post-trial or custodial stage. Also important to balance the interest are the laws, rules and instruments which regulate criminal proceedings

2.2 NATURE, SCOPE AND CONCEPT OF NIGERIAN CRIMINAL JUSTICE SYSTEM

The theory of systems consist of an arrangement of components designed to accomplish particular objectives according to plan. These components comprise of the people and institutions involved in achieving a desired goal or objective of justice.²

A system according to Schoderbek³ is an organized or complex whole, and assemblage or combination of things or parts forming a complex or unitary whole.

A system presupposes the existence of the following:

- a. A purpose or objective which the system is designed to perform;
- b. Design or an established arrangement of the components; and
- c. Input of information, energy and materials in consonance with the plan.

² See Bohnson, R. A., *et al*, (1963) *The Theory and Management of Systems*, 2nd Edition, New York, McGraw Hill, p. 113

³ Schoderbek, P. P., (1968) *Management Systems*, New York, Wiley, p. 113

In the administration of justice, the justice sector includes the criminal and civil justice systems. According to George Rush⁴ criminal justice in its broad sense connotes the machinery, procedures, personnel and purposes which have to do with the content of the criminal law. It covers the arrest, trial, conviction and disposition of offenders. A criminal justice system is a legal entity. The author therefore perceives the administration of the system as involving the police, the prosecutor's office, the courts, penal institutions, probation, parole and the officials charged with administering their defined duties. The Black's Law Dictionary⁵ defines the criminal justice system as the collective institutions through which the accused offender passes until the accusations have been disposed of or the assessed punishment concluded. It has been regarded as:

a loose federation of agencies each separately budgeted, each drawing its manpower from separate wells, and each a profession unto itself⁶.

Furthermore, it is possible to view criminal justice as a sequence of decision making- stages. Through this system offenders are either passed on to the next stage or diverted out of the system. This diversion may be due to any number of reasons such as lack of evidence or a desire to reduce the load in the system. Each subsequent stage of the process is dependent upon the previous stage for its element. It is this dependence that best exemplifies the system nature of criminal justice.⁷

⁴ *Dictionary of Criminal Justice*, Holbrook Press Inc., 1977 edition, p. 36

⁵ Garner, B. A., (2001) *Black's Law Dictionary*, 7th ed., London, Sweet and Maxwell Ltd.

⁶ New, D. J., (1978), *Introduction to Criminal Justice*, New York, Leppincott, p. 3, cited in Danbazau, A. B., (2011) *Criminology and Criminal Justice*, Spectrum Books Ltd. Ibadan, p. 174

⁷ See Clare, P. K. and Kramer, J. H., (1977) *Introduction to American Corrections*, Boston, M. A., Holbrook Press Inc., pp. 3-4

However the United States Advisory Commission on Criminal Justice sees the criminal justice system as including many public and private agencies and citizens outside the police, courts and corrections that are or ought to be involved in reducing and preventing crime and involved in the management of affairs of criminal justice⁸. The opposite of the above definitions in the civil justice system is that the management is of a civil nature.

The objectives entail the philosophies underlying the criminal law which is aimed at societal control and regulation of behaviours. The established arrangement involves the institutions like the police, courts and the prisons while the inputs of information, energy or materials are those which border on the administration.⁹

Criminal justice in traditional societies of Nigeria was based on collective will of the societies (or people). These traditional societies used such means as ostracism, banishment, imprisonment, whipping, labour work and even death. However, the criminal justice system and the methods of trial for determining the guilt of the accused persons were not defined. Their punishment left no room for mitigation, appeal or mercy. It was more of trial by ordeal, and execution by savagery ó like the throwing of twins into the forest and the banishment of their mothers.¹⁰ Nigeria now has a modern criminal justice system, but this cannot be said to be devoid of problems, difficulties and setbacks, despite the well-defined structure of the criminal justice system.

⁸See Morris, W.(1971) *The American Heritage Dictionary of the English Language*, Boston, Houghton Mifflin, American Heritage; cited in Banire, M. A., "Criminal Justice Administration and the Question of Legal Assistance in Nigeria", *The Nigerian Journal of Contemporary Law, Nigerian Society of Contemporary Law*, Faculty of Law, University of Lagos, Vol. 18, 1994-1996, p. 89

⁹See Banire, M.A., *ibid*.

¹⁰ Mbaba, I,(2010) "The Working Structure of the Criminal Justice System in Nigeria", *Eket Bar Journal*, vol.1, No 2, p. 50

2.3 INSTITUTIONS INVOLVED IN THE NIGERIAN CRIMINAL JUSTICE SYSTEM

In criminal justice administration there are three distinct stages of a citizen's contact with the system. These are the pre-trial, trial and post-trial or custodial stage. At these stages are also three relevant institutions which are responsible for criminal justice administration. These are:

1. The Police and other law enforcement agencies.
2. The Judiciary
3. The Prison Service.

There are also the informal institutions for the administration of justice which refer to the traditional systems or organs for the resolution of conflicts. The following paragraphs discuss the formal institutions involved in criminal justice administration.

2.3.1 THE POLICE¹¹

The Nigerian Police Force is a creation of the Constitution.¹² The statutory duties of the Police are contained in the Police Act.¹³ Section 214(2) b of the Nigerian Constitution provides that members of the Nigerian Police Force shall have such powers and duties as may be conferred upon them by law. Section 4 of the Police Act provides that the:

¹¹For the history of the Nigeria Police, see Mpamugo, V. A., "The Role of the Nigerian Police in Human Rights Protection and Enforcement", 1996, *Abia State University Law Journal*, p. 30; Tamuno TN, *The Police in Nigeria*, Ibadan, University Press, p. 1; Ehindero G.E., *The Police and the Law in Nigeria*, Lagos, Times Press, pp. 1-2.; Oyakhire, P.A.O., "Re-positioning the Nigeria Police to meet the challenges of policing a democratic society in the 21st Century and Beyond", *The text of a paper presented at the retreat of the Police Service Commission, 1-4 November 2010* at the Le-Meridian Hotel Uyo, Akwa-Ibom See <http://www.psc.gov.ng/files/PROPER%20ORG%20AND%20MANG.pdf> visited last on 4/10/2012.

¹²See Section 214 of the 1999 Constitution of Nigeria

¹³Cap P19, Laws of the Federation of Nigeria, 2004

Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged and shall perform such military duties within and without Nigeria as may be required of them by or under the authority of this or any other Act.

In the exercise of the power of arrest which is the first step in the criminal process, both the Criminal Procedure Act¹⁴ and the Criminal Procedure (Northern States) Act¹⁵ provide for the power of arrest but the power has its basis in the Constitution itself. Section 35(1) of the 1999 Constitution provides that a person can be deprived of his liberty for the purposes of bringing him before a court in execution of the order of a court, or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence. While Section 10 of the Criminal Procedure Act introduced into the arrest decision the classification of offences into indictable and non-indictable, section 20(2) of the same Act introduced the classification of arrest into warrant and without warrant. Section 27 of the Police Act provides for the bail of a person arrested without warrant by the police.

Investigation of a criminal complaint by the police is a preliminary course which may or may not result in a criminal prosecution. In the case of *Fawehinmi v Inspector General of Police*¹⁶ the Supreme Court held that in criminal proceedings where allegations of crime are made, there is almost always the need to ensure that there is sufficient evidence to prosecute and these may involve questions of arrest and detention where necessary of the person or persons involved. The responsibility of gathering and arranging the evidence required for the prosecution of a person accused of the

¹⁴ Cap C41, Laws of the Federation of Nigeria, 2004

¹⁵ Cap C42, Laws of the Federation of Nigeria, 2004

¹⁶ [2002] 7 N W L R (Pt.767) 606

commission of an offence rests entirely with the police. In doing this the police take statements from potential witnesses, suspects or the actual offenders and this is referred to as interrogation. The aim of the process of interrogation is to obtain facts, confessions, admissions and other incriminating statements necessary to make decision about the offence and alleged offender. The rules governing police interrogation of suspects or defenders are the Judges Rules of England 1964 which applies in the Southern States and the Judges Rules formulated in 1912 by the Judges of the Kings Bench of England. The old rules have been superseded by the six new Judges Rules published by the British Home Office in 1964. The Rules apply in Nigerian courts but have been modified in the Northern States.¹⁷

Section 4 of the Police Act gives the Police the power to conduct in person prosecution of criminal cases. This is however subject to the powers of the provisions of Section 194 and 211 of the 1999 Constitution of Nigeria which relates to the powers of the Attorney-General of the Federation and that of the State to institute and undertake, take over and continue or discontinue criminal proceedings against any person. In the case of *Federal Republic of Nigeria v George Osahon and seven others*,¹⁸ the Supreme Court held by a majority of 5 to 2 that a police officer can prosecute a charge in the Federal High Court by virtue of Section 23 of the Police Act although it will be more desirable if the person appearing before the courts possesses both attributes by being a qualified legal practitioner and a police officer. A more active prosecution regime will relieve law officers of the office of the Attorneys General of the Federation and the States of the workload of prosecuting proceedings which will help decongest the system of criminal justice administration. The police at the trial stage also have the responsibility of ensuring the attendance of witnesses and the production of exhibits in courts.

¹⁷ See Criminal Procedure (Statements to Police Officers) Rules, 1960

¹⁸ [2005] 5 N W L R (Pt. 973) 361

The Police in performing their duties work in conjunction with other organs of the government and government ministries and parastatals. These bodies include the Ministry of Justice through the Department of Public Prosecutions and the Prison

A. ORGANIZATION AND STRUCTURE OF THE POLICE

The Constitution provides at the top a Police Council headed by the President of the Country followed by the Police Service Commission¹⁹ and then the Police Force. The Ministry of Internal Affairs supervises the Police Service Commission and the Police.

The Police Council consists of:

- (a) The President who shall be the Chairman;
- (b) The Governor of each State of the Federation;
- (c) The Chairman of the Police Service Commission and
- (d) The Inspector-General of Police.

The functions of the Police Council to include:

- (a) The organization and administration of the Nigeria Police and all other matters relating thereto (not being matters relating to the use and operational control of the Police or the appointment, disciplinary control and dismissal of members of the Force);
- (b) The general supervision of the Nigeria Police and
- (c) Advising the President on the appointment of an Inspector General of Police.

The Police Service Commission is composed of the following members:

- (a) Chairman; and
- (b) Such number of other persons, not less than seven but not more than nine, as may be prescribed by an Act of the National Assembly.

The Commission has the power to:

¹⁹ See 3rd Schedule to the Constitution

- (a) Appoint persons to offices in the Nigeria Police Force other than the office of the Inspector-General of Police;
- (b) Dismiss and exercise disciplinary control over persons holding offices in the Nigeria Police Force.

The Police force is organized and managed under Zonal Commands, Divisions and outposts.

B. CONSTRAINTS OF THE POLICE

Dr Prince A.O. Oyakhire, former Assistant Inspector-general of Police identified the challenges and problems facing the Nigeria Police in these words:²⁰

Followings are some of the identified challenges or problems currently affecting Management in the Nigeria Police:

- (a) Inadequate manpower in terms of quantity but indeed more of quality;
- (b) Inadequate funding. Has been funded only for mere existence rather than performance;
- (c) Poor crimes and operational information management including inaccurate recording and collation, poor storage and retrieval, inadequate analysis and infrequent publications of criminal statistics.
- (d) Poor remunerations and unimpressive conditions of service;
- (e) Inadequate INITIAL and on-the job training. Deficient or obsolete syllabus which places too much emphasis on law enforcement and order maintenance without adequate liberal and broad training that can illuminate the nature and source of law and criminality;

²⁰ Oyakhire, P.A.O., "Re-positioning the Nigeria Police to meet the challenges of policing a democratic society in the 21st Century and Beyond", *The text of a paper presented at the retreat of the Police Service Commission, 1-4 November 2010* at the Le-Meridian Hotel Uyo, Akwa-Ibom State, Nigeria. See <http://www.psc.gov.ng/files/PROPER%20ORG%20AND%20MANG.pdf> visited last on 4/10/2012

- (f) Poor resource management;
- (g) Inadequate logistics, arms and ammunition, uniforms and accoutrements, telecommunications and transportation facilities in terms of quality and quantity;
- (h) Inadequate office and residential accommodation;
- (i) Inhuman conditions under which suspects are held in Police cells;
- (j) Un-hygienic working environment;
- (k) Limited contacts or relationship with citizens outside law enforcement and order maintenance functions;
- (l) Indiscipline, involvement in crimes or collusion with criminals;
- (m) Lack of integrity; Absurd attitudinal chemistry (must change);
- (n) Perversion of the course of justice (i.e. procuring or supplying false evidence, tampering with exhibits and false accusations);
- (o) Poor knowledge of law and disregard for human rights;
- (p) Corruption and extortion.

2.3.2 THE NIGERIAN CUSTOM SERVICE

The Nigerian Custom Service is a creation of the Custom and Excise Management Act²¹ which vests legal authority on the Nigerian Customs Service to act on behalf of the Federal Government of Nigeria in all custom matters. This is supported by various supplementary legislation such as Customs and Excise Management (Disposal of Goods) Act²², Customs and Excise Special Panel and other Provisions²³; Customs and Excise Dumped and Subsidized Goods) Act²⁴; Nigeria Pre-shipment Inspection Act²⁵, and the Constitution of the Federal Republic of Nigeria, 1999 as amended amongst other laws. The Act confers on the

²¹Cap C45, Laws of the Federation of Nigeria, 2004.

²²Cap C46, Laws of the Federation of Nigeria, 2004.

²³Cap C45, Laws of the Federation of Nigeria, 2004.

²⁴ Cap C48, Laws of the Federation of Nigeria , 2004

²⁵ No. 36 of November, 1979 further amended by Decree No.11 of 19th April, 1996

Custom Services the powers to fully prosecute offenders of customs offences in the relevant courts.

2.3.3 IMMIGRATION OFFICERS

The Immigration Act²⁶ creates the posts of Director of Immigration, Deputy Directors and other Immigration officers²⁷ for the control of immigration. These officers can exercise powers of deportation and detention under the Act.

2.3.4 SHERIFFS

Under the Sheriffs and Civil Process Act²⁸ (and Laws for the States) there are appointed persons known as Sheriffs and Deputy Sheriffs for each State and for the Federal Capital Territory Abuja. Bailiffs are also appointed to assist them. The Sheriff may command any person to arrest any person who has committed or is suspected of having committed a felony.²⁹

2.3.5 FEDERAL ROAD SAFETY COMMISSION

The Federal Road Safety Commission Act³⁰ establishes the Federal Road Safety Commission. The Commission has functions and responsibilities under the Act; and in the exercise of these functions members of the corps have powers of arrest and persecution of offenders of the provisions of the Act.³¹

2.3.6 NIGERIA SECURITY AND DEFENCE CORPS ACT

The Nigeria Security and Defence Corps Act³² established the Civil Defence Corps which shall among other things assist in the

²⁶ *Cap* II Laws of the Federation of Nigeria 2004.

²⁷ See section 9 and 52 Immigration Act, *Cap* II Laws of the Federation of Nigeria 2004.

²⁸ *Cap* S6 Laws of the Federation of Nigeria 2004.

²⁹ See section Sheriffs and Civil Process Act, 7 *Cap* S6 Laws of the Federation of Nigeria 2004.

³⁰ *Cap* F19 Laws of the Federation of Nigeria 2004

³¹ See section 11.

³² *Cap* N146 Laws of the Federation of Nigeria 2004.

maintenance of peace and order and in the protection and rescuing of the civil population during the period of emergency; and recommend to the Minister the registration of private guard companies. The Corps have power to arrest with or without a warrant, detain, investigate and institute legal proceedings by or in the name of the Attorney-General of the Federation against any person who is reasonably suspected to have committed an offence under this Act or is involved in any criminal activity; chemical poisoning or oil spillage, nuclear waste, poisoning; industrial espionage or fraud; activity aimed at frustrating any Government programme or policy; riot, civil disorder, revolt, strike or religious unrest; or power transmission lines, or oil pipelines, NIPOST cables, equipment, Water Board pipes or equipment vandalism.³³

2.3.7 NATIONAL SECURITY AGENCIES ACT

There are three agencies created and established under the National Security Agencies Act³⁴, namely:

- i. The Defence Intelligence Agency
- ii. The National Intelligence Agency; and
- iii. The State Security Service

The Defence Intelligence Agency is charged with the responsibility for :

- a. the prevention and detection of crime of a military nature against the security of Nigeria;
- b. the protection of all military classified matters concerning the security of Nigeria, both within and outside Nigeria;
- c. such other responsibilities affecting defence intelligence of a military nature, both within and outside Nigeria.

The National Intelligence Agency is charged with the responsibility for:

³³ See section 3.

³⁴ Cap N74 Laws of the Federation of Nigeria 2004.

- a. the general maintenance of the security of Nigeria outside Nigeria concerning matters that are not related to military issues;
- b. such other responsibilities affecting national intelligence outside Nigeria.

The State Security Service is charged with the responsibility for:

- a. the prevention and detection within Nigeria of any crime against the Internal security of Nigeria;
- b. the protection and preservation of all non-military classified matters concerning the internal security of Nigeria.

The Act does not provide specific powers of investigation, arrest and detention but the President's Instruments made pursuant to the Act prescribes these powers.

2.3.8 THE ARMED FORCES

The Armed Forces are the Army, Air force and Navy. These are not day-to-day security agencies and they have the primary role of defending the nation against foreign aggression. There are circumstances where they are deployed internally to help secure the state during emergencies and other circumstances like terrorism. In these circumstances they generally perform the duties of the Police and do arrest and detain persons though the standard is that if they arrest a civilian, such a person ought to be handed over to the police within a reasonable time.

2.3.9 INDEPENDENT CORRUPT PRACTICES AND OTHER RELATED OFFENCES COMMISSION

The Independent Corrupt Practices and Other Related Offences Commission was set up under the Corrupt Practices and Other Related Offences Act.³⁵ The duties of the Commission are provided for in section 6 of the Act as follows:

³⁵ Cap C31 Laws of the Federation of Nigeria 2004.

- (a) Where reasonable grounds exist for suspecting that any person has conspired to commit or has attempted to commit or has committed an offence under this Act or any other law prohibiting corruption, to receive and investigate any report of the conspiracy to commit, attempt to commit or the commission of such offence and in appropriate cases, to prosecute the offenders.
- (b) To examine the practices, systems and procedures of public bodies and where, in the opinion of the Commission, such practices systems or procedures aid or facilitate fraud or corruption, to direct and supervise a review of them.
- (c) To instruct, advise and assist any officer, agency or parastatal on ways by which fraud or corruption may be eliminated or minimized by such officer.
- (d) To advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Commission thinks fit reduce the likelihood or incidence of bribery, corruption and related offences.
- (e) To educate the public on and against bribery, corruption and related offences, and
- (f) To enlist and foster public support in combating corruption.

The Commission has power of investigation, search, seizure and arrest.

2.3.10 THE ECONOMIC AND FINANCIAL CRIMES COMMISSION

The Economic and Financial Crimes Commission is a creation of the Economic and Financial Crimes Commission Act³⁶ and is concerned with the investigation of all economic and financial crimes including advanced fee fraud, counterfeiting, illegal charge transfers, futures market fraud, etc, the coordination and enforcement of all economic and financial crimes conferred on any other person or authority, the adoption of methods to eradicate the

³⁶ Cap E1, Laws of the Federation of Nigeria, 2004

commission of economic and financial crimes; the examination, investigation and prosecution of all reported cases of economic and financial crimes by any person(s) or organizations etc. By the Act, the Commission is given the duty of enforcing the Money Laundering Prohibition Act 2011, the Advanced Fee Fraud and Other Related Offences Act³⁷, the Banks and other Financial Institutions Act³⁸, and any other law or regulation relating to economic and financial crime and carrying out and sustaining rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria amongst other duties.

2.3.11 NATIONAL DRUG LAW ENFORCEMENT AGENCY

The National Drug Law Enforcement Agency of Nigeria (NDLEA) is a creation of the National Drug Law Enforcement Agency of Nigeria Act³⁹ which is an independent and enforcement agency for drug related matters. The Agency was created in 1989 to eliminate drug trafficking and corruption in the country. It replaced the Board of Customs and Excise and the Nigerian Police for drug interdiction and the Federal Welfare Department for drug counselling and treatment.

2.3.12 THE PRISON SERVICE

The Nigerian Prisons Service derives its operational powers from the Prison Act.⁴⁰ It performs the following functions:

- i. Take into lawful custody all those certified to be so kept by courts of competent jurisdictions;
- ii. Produce suspects in court as and when due;
- iii. Identify the causes of their antisocial dispositions;
- iv. Set in motion mechanisms for their treatment and training

³⁷ Cap A6, Laws of the Federation of Nigeria, 2004

³⁸ Cap B3, Laws of the Federation of Nigeria, 2004

³⁹ Cap N30, Laws of the Federation of Nigeria, 2004

⁴⁰ Cap P29, Laws of the Federation of Nigeria, 2004

- for eventual reintegration into society as normal law abiding citizens on discharge; and
- v. Administer prison's farms and industries for this purpose and in the process generates revenue for the government.

The Prison Service is wholly set up and managed in Nigeria exclusively by the Federal Government under the Constitution but most of the inmates and detainees come from State courts.

Nigeria has over 400 facilities spread across the 36 states. It has a population of about 39,763 prison inmates with about 25,648 prison inmates on remand custody and about 14,115 convicted inmates. The prisons are for custody, retribution, deterrence, reformation and rehabilitation of the convicted prisoner. The most common problem is congestion in the prisons.⁴¹

The prison plays a prominent role in the administration of criminal justice especially at the trial and post-trial stages. It is saddled with the responsibility of custody as well as conveying accused persons who are remanded in prison custody and are awaiting trial to and from prison. The prison should play complimentary role to the Judiciary in that it is a place where criminals should be reformed and rehabilitated to make them to be useful to the society when their terms of imprisonment run out.

2.3.13 BORSTAL INSTITUTION AND REMAND CENTRE; AND STATE GOVERNMENT ACCOMMODATION

Borstal Centres have been established under the Borstal Institutions and Remand Centres Act.⁴² A remand centre is a place for the detention of persons not less than sixteen years but under twenty-one years of age who are remanded or committed in custody for trial or sentence.⁴³ A borstal institution is a place in

⁴¹For more information, see the official website of the Nigerian Prisons available at <http://www.prisons.gov.ng/index.php>, last accessed on 23 December 2011

⁴² *Cap B11* Laws of the Federation of Nigeria 2004.

⁴³ See section 3 Borstal Centres have been established under the Borstal Institutions and Remand Centres Act.

which offenders who were not less than sixteen but under twenty-one years of age on the day of conviction may be detained and such training and instructions as will conduce to their reformation and the prevention of crime.⁴⁴ A prison or any part of a prison may be declared to be a remand centre or borstal institution. In addition to the application of the Borstal and Remand Centre Regulations to remand centres and borstal institutions, the Prison Act also applies to the centres and institutions.⁴⁵

Under the Childø Rights Act (and Laws for the States that have enacted State versions), every State ought to establish Government accommodation where a child offender may be accommodated or detained where bail has not been granted.

2.3.14 MINISTRY OF JUSTICE, ATTORNEY-GENERAL AND DIRECTOR OF PUBLIC PROSECUTION

The Ministry of Justice is an organ of the government established to prosecute and defend matters on behalf of the government. The Ministry of Justice is headed by the Attorney-General and Minister of Justice who is the Chief Law Officer of the Federation or of the State as the case may be. The Attorney-General whether for the Federation or the State has the constitutional duty of prosecuting criminal and civil matters. This responsibility is provided for in sections 174 and 211 of the Constitution.

Both sections empower the Attorney-General to institute and undertake criminal proceedings against any person before any court of law in Nigeria, take over and continue any such criminal proceedings that may be instituted by any other authority or person and to discontinue at any stage before judgment is delivered in any such criminal proceedings instituted or undertaken by him or any other authority or person.⁴⁶

⁴⁴See section 3 Borstal Centres have been established under the Borstal Institutions and Remand Centres Act.

⁴⁵ See section 10 Borstal Centres have been established under the Borstal Institutions and Remand Centres Act.

⁴⁶ This is referred to as *nolle prosequi*

The powers conferred upon the Attorney-General may be exercised by him or through officers of his department usually referred to as Legal Officers or State Counsel. The Ministry of Justice is divided into departments namely Public Prosecutions, Civil Litigation, Legal Drafting and Conveyancing, Law Reform and Administrator General and Public Trustee. The Solicitor-General heads the Ministry while the Director of Public Prosecution (DPP) heads the Prosecution department.

When a defendant is brought on a holding charge before a Magistrate Court that usually does not have jurisdiction, the court usually would order the remand of the defendant in prison and order the Police to transfer the case file to the DPP for advice. Such cases would normally be given to a state counsel that reports to the DPP. The DPP is responsible to the Attorney-General but would not normally refer cases to the Attorney-General on day to day basis.

2.3.15 THE COURTS

Section 6 of the Constitution of Nigeria vests judicial powers in the courts. Its essential powers extend notwithstanding anything to the contrary, to all inherent powers and sanctions of a court of law. The judicial powers also extend to all matters between persons or between government and authority and any person in Nigeria, and to all actions and proceedings relating thereto for the determination of any question as to the civil rights and obligations of that person.⁴⁷

The courts play a primordial role in the dispensation of justice. The Constitution has made provisions for both superior and inferior courts of records to achieve this objective. Superior courts of record are courts of unlimited jurisdiction which are specifically mentioned in the Constitution. They are so called because there is a minimal limit to their jurisdiction in relation to the type of subject matter they can handle but are not limited in jurisdiction as per the

⁴⁷ See Section 6(6)b

mere value of the subject matter of a case. These courts include the Supreme Court⁴⁸, the Court of Appeal⁴⁹, the Federal High Court⁵⁰, the High Court of the Federal Capital Territory⁵¹, the High Court of a State⁵² the Sharia Court of Appeal of the Federal Capital Territory⁵³, the Sharia Court of Appeal of a State,⁵⁴ the Customary Court of Appeal of the Federal Capital Territory⁵⁵, the Customary Court of Appeal of a State⁵⁶ and the National Industrial Court.

On the other hand inferior courts of record are those that have limits to their jurisdiction in relation to the type as well as value of the subject matter⁵⁷. They are normally subject to the supervisory jurisdiction of the High Court. In view of this, nothing precludes the National Assembly or a State House of Assembly from establishing courts referred to above with subordinate jurisdiction to that of the High Court. These courts include the Magistrates' Courts, Area Courts, Sharia Courts and Customary Courts. Various Rules of civil procedure regulate court proceedings. Criminal proceedings are generally regulated by the Criminal Procedure Act⁵⁸ and the Criminal Procedure (Northern States) Act.⁵⁹

2.3.16 CHIEF JUDGE

The Constitution provides for the position of the Chief Judge of the Federal High Court⁶⁰ and State High Court⁶¹ and of the Federal

⁴⁸ See Section 230(1)

⁴⁹ See Section 237(1)

⁵⁰ See Section 249(1)

⁵¹ See Section 255

⁵² See Section 270(1)

⁵³ See Section 260(1)

⁵⁴ See Section 275(1)

⁵⁵ See Section 265(1)

⁵⁶ See Section 280(1)

⁵⁷ See Obilade, A. O.(1979), *The Nigerian Legal System*, London, Sweet and Maxwell, p. 169

⁵⁸ Cap C41

⁵⁹ Cap C42

⁶⁰ See section 229(1)

⁶¹ See section 235(1)

Capital Territory Abuja. An important function of the Chief Judge is called *õjail deliverõ*. Under this scheme, the Chief Judge visits the prison to review cases of pre-trial detainees who may require to be released unconditionally or on bail in deserving cases such as:

- a. Detainees that served more time in detention without trial more than they would have stayed had they been convicted;
- b. Those that deserve to be released on bail due to the circumstances of their case including health reasons;
- c. Detainees that were granted bail but could not fulfil the conditions of the bail due to the circumstances of the case and the offences are not serious ones; and so on.⁶²

The Chief Judge is the Chairman of the Administration of Justice Committee at state level and the Chief Justice of the Federation, the Chairman of the Administration of Justice Commission.

2.3.17 CODE OF CONDUCT TRIBUNAL

The Code of Conduct Tribunal (and Bureau) exist pursuant to the Code of Conduct Bureau and Tribunal Act⁶³ to deal with complaints by public servants for the breaches of its provisions. The Tribunal is given specific powers to issue search warrants, issue of summons for witnesses, and may issue warrant of arrest for a witness after summons but there is no specific provision for compelling the defendant. A power to compel the attendance of a defendant in the proceedings of the Tribunal can only be implied from rule 2 of the Third Schedule to the Act. In reality, the Tribunal issues summons and warrants of arrest against defendants.

⁶² See Adeyemi A. A., *õA Demand Side Perspective on Legal Aid: What Services Do People Need. The Nigeria Situationõ*, *Access to Justice in Africa and Beyond. Making The Rule of Law A Reality*, Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law Chicago, Illinois, 2007, p. 122

⁶³ See *Cap C15 Laws of the Federation of Nigeria 2004*.

2.3.18 ADVISORY COUNCIL ON PEROGATIVE OF MERCY

At both Federal and State levels, there are Advisory Councils that advises the President and the Governors on Prerogative of mercy under sections 175 and 212 of the Constitution. Under the Constitution, the President and Governors of States may:

- (a) Grant any person concerned with or convicted of any offence a pardon, either free or subject to lawful conditions;
- (b) Grant any person a respite, or the execution of any punishment imposed on that person for such an offence;
- (c) Substitute a less severe form of punishment for any person for such an offence; or
- (d) Remit the whole or any part of punishment for any punishment imposed on that person for such any offence or of any penalty.

2.3.19 THE LEGAL AID COUNCIL

The Legal Aid Act of 2011 gives the Legal Aid Council the powers to deal with civil, criminal and fundamental rights matters brought to it by litigants who are indigent. The Act determined indigency as those whose income does not exceed the national minimum wage.⁶⁴

The essence of the Act is to improve access to justice by the citizenry of Nigeria. However, the Legal Aid Council is not devoid of constraints to execute its duties such as lack of funds to enable it provide legal assistance to all indigent and underprivileged Nigerians who require its services, few personnel, lack of operational vehicles, office equipment, etc.

2.3.20 THE NATIONAL HUMAN RIGHTS COMMISSION OF NIGERIA

The National Human Rights Commission of Nigeria was established in 1995 as a response to the Vienna Declaration and

⁶⁴ See section 10(1)

Programme of Action adopted by the World Conference on Human Rights in Geneva⁶⁵

It was created as an organ for facilitating Nigeria's implementation of its various human rights treaty organizations including but limited to the UDHR, the International Convention on the Elimination of All Forms of ⁶⁶Racial Discrimination and the African Charter on Human and Peoples Rights. It was also created as a mechanism for extrajudicial recognition, promotion and enforcement of human rights and a forum for public enlightenment and dialogue on human rights issues.

Section 5 of the National Human Rights Commission Act sets out in ten sub paragraphs the functions and powers of the Commission. These Include:

- (i) To monitor and investigate all alleged cases of human rights violations in Nigeria.
- (ii) To organize local and international seminars, workshop and conferences in human rights issues for public enlightenment and
- (iii) To liaise and co-operate with local and international organizations on human rights with the purpose of advancing the promotion and protection of human rights.

The NHRC also operates as a complaint mechanism which offers Nigerians a simple inexpensive and non-technical procedure for redress of human rights violations. To this extent its rules of

⁶⁵ Folashade A. K., (Executive Secretary, NHRC), "National Human Rights Commission: Its Mandate and Operations, Legal Developments" *In The New World Order, Essays on International, Comparative and Public Law in Honour of Prof. U. O. Umozurike*, (Eds.) Unegbu M. O. and Okoronye I., Jite Law Books, 2009, p. 1

⁶⁶ Omo U., (Former Justice of the Supreme Court as he then was ad erstwhile Chairman of NHRC), "The Role of the NHRC in the Promotion and Protection of Human Rights in Nigeria", *Current Themes in the Domestication of Human Rights Norms*, Eds., Nweze C. C. and Nwankwo O., *Proceedings of CIRDDOC'S Judicial Colloquia in the Domestic Application of International Human Rights Norms*, Fourth Dimension Publishers, Enugu, 2003, p. 3.

admissibility ensure that it does not entertain any matters which are before the courts.

2.4 LAWS, RULES AND INSTRUMENTS REGULATING CRIMINAL PROCEEDINGS

2.4.1 CONSTITUTION

The Constitution contains provisions relevant to the criminal processes that affect imprisonment and pre-trial detention such as chapter IV on fundamental rights especially section 35 on liberty of a person, and section 36 on fair hearing; and chapter V11 on appeals from one court to the other.

2.4.2 THE CRIMINAL PROCEDURE ACT⁶⁷

This is an Act to make provisions for the procedure to be followed in criminal cases in the High Courts and Magistrate Courts in most of the Southern States of Nigeria. It makes provisions for institution of criminal proceedings, processes to compel attendance of an offender in court, searches, bail, jurisdiction, charges, pleas and conclusion of trial.

2.4.3 THE CRIMINAL PROCEDURE CODE⁶⁸

The Criminal Procedure Code makes provision for the procedure to be followed in criminal trials in the Northern States of Nigeria and makes similar provisions for the different stages in a criminal trial as provided by the Criminal Procedure Act.

2.4.4 THE ADMINISTRATION OF JUSTICE COMMISSION ACT

In Nigeria, the Administration of Justice Commission Act⁶⁹ sets up the Administration of Justice Commission with the responsibility among other things over the general supervision of the administration of justice. The Commission has the Chief Justice of

⁶⁷ Loc cit

⁶⁸ Op cit

⁶⁹ Cap A3 Laws of the Federation of Nigeria, 2004

Nigeria as the Chairman, the Attorney General of the Federation, the Minister of Defence, the Inspector General of Police, the Director of Prisons and the President of the Nigerian Bar Association as members.

The duty of the Commission is to ensure that the court system in Nigeria is generally maintained and adequately financed; judges and officers of the courts conform with the code of ethics of their office; criminal matters are speedily dealt with; congestion in courts is greatly reduced; congestion in the prisons is drastically reduced and persons awaiting trial are as much as possible not detained in prison custody. Section 4 of the Act clearly states that each State in Nigeria must establish the Administration of Justice Committee, to be headed by the Chief Judge of the State, with the Attorney General of the State, the Commissioner of Police of the State, and the Chairman of the State branch⁷⁰ of the Nigerian Bar Association as members. This Committee is charged with the responsibility of the general administration of justice in the State and the effective performance of the functions of all organs charged with responsibility for the administration of justice in the State.

2.4.4 THE MAGISTRATE COURT RULES

Each State has its own Magistrate Court established under the Law of the State and there are Magistrate Court Rules making provisions for practice and procedure in civil and criminal matters before the Magistrate Courts. The power to make the rules is derived from the Law creating the Court, in this case the Magistrate Court Law.⁷¹

⁷⁰ Though there are no State branches of the Nigerian Bar Association. Branches are set up in judicial divisions and so there could be more than one branch in a state (and there are many branches in many states).

⁷¹ See Ojukwu, E. and Ojukwu, C. N.,(2009), *Introduction to Civil Procedure*, 3rd Edition, Abuja, Nigeria, Helen-Roberts, p. 12

2.4.6 THE CHILDREN AND YOUNG PERSONS LAW

The above law makes provision for the welfare of children and young offenders and for the establishment of juvenile courts in many states. Section 3 of the Children and Young Persons Law of Abia State for example, provides for the granting of bail to a child and young person who is charged with committing an offence while section 4 provides for their custody if not discharged on bail after arrest. Section 5 provides that it shall be the duty of all police officers to make arrangement for preventing so far as practicable a child or young person while in custody from associating with an adult charged with or convicted of an offence. The purpose of this provision is to insulate juveniles from bad influences of adult inmates. Section 6(1) provides for the constitution of the juvenile court which shall be constituted by a Magistrate sitting with such persons if any as the Chief Judge of Abia State shall appoint. Section 6(5) and (6) of the Law ensures that there is confidentiality in the proceedings which are conducted in camera. This strategy aims to avoid stigmatizing juveniles and assists them to grow out of crime.

2.4.7 CHILD'S RIGHTS ACT

The Child's Rights Act (and Laws for States that have enacted State versions) defines child. The Act places special responsibilities on parents, guardians, the State, the Police, the Courts and any other person in contact with a child and suspected or actual child offender, such as:

- (a) The State ought to provide State Government accommodation for child offenders or for the protection of the child where necessary;
- (b) The police, prosecutor or any other person dealing with a case involving a child offender shall have the power to dispose of the case without resorting to formal trial by using other means of settlement, including supervision, guidance, restitution and compensation of victims as long as the offence involved is of non-serious nature. Police investigation and adjudication before the court shall be used only as measures of last resort.

- (c) On apprehension of a child, the parents or guardian shall be immediately notified, and the court or police shall without delay, consider the issue of release.
- (d) Detention pending trial shall be used only as a measure of last resort and for the shortest possible of time and wherever possible, be replaced by alternative measure, including close supervision, care by and placement with a family or in an educational setting or home.
- (e) While in detention, a child shall be given care, protection and all necessary individual assistance.
- (f) Where a court authorises an apprehended child to be kept in police detention, the court shall, unless it certifies that it is impracticable or in the case of a child who has attained the age of fifteen years, that no secure accommodation is available and that keeping him in some other authority's accommodation would not be adequate to protect the public from serious harm from the child, secure that the child is moved to a State Government accommodation.
- (g) Classification in the place of detention pending trial shall take into account of the social, educational, medical and physical characteristics and condition of the child, including his age, sex and personality.
- (h) Where a child is brought to court, the court shall among other things, ensure that the child is not deprived of his personal liberty unless he is found guilty of a serious offence involving violence against another person, or persistence in committing other serious offences, and there is no other appropriate response that will protect the public safety.
- (i) Where a court does not release a child who admits to committing one or more offences charged against him, the court shall remand the child to a State Government accommodation.⁷²

The Act provides that in every action concerning a child, the best interest of the child shall be the primary consideration.⁷³ The Act defines a child to be a person under the age of eighteen years.⁷⁴

⁷² See Part XX Child's Rights Act.

⁷³ See section 1.

⁷⁴ See section 277.

CHAPTER 3

Procedure for Instituting Criminal Proceedings

OUTCOMES

- (i) Explain the principles governing arrest, investigation, detention, bail, prosecution and imprisonment under Nigerian law.
- (ii) Explain the procedure for commencing criminal proceedings in different parts of Nigeria and the stages and processes from arrest to pre-trial.

3.1 INTRODUCTION

Criminal procedure is the method stipulated by the law for bringing to a court of law trial a person who is alleged to have committed a crime. Criminal proceedings must be instituted in conformity with the methods prescribed by law. The principal enactments that govern the procedures for commencing criminal cases are mainly the Criminal Procedure Act and Laws (CPA/CPL)¹ applicable to the Southern States of Nigeria and the Criminal Procedure Code (CPC)² applicable to the Federal Capital Territory Abuja and the Northern States of Nigeria. However, Lagos State now applies the Administration of Criminal Justice Law first enacted in 2007 and revised in 2011. This law replaces the Criminal Procedure Act as the principal enactment that governs

¹ See for example, Criminal Procedure Act, Laws of the Federation of Nigeria, 2004; Criminal Procedure Code Act, Cap 491 Laws of the Federal Capital Territory, Abuja 2007; Criminal Procedure Law, Cap 38 Laws of Ondo State 2006 vol.2; Criminal Procedure Law of Rivers State cap. 38 Laws of River State 1999 vol.2

² See for example the Criminal Procedure Code Law, Cap 38 Laws of Bauchi State, 2007

the procedure for instituting criminal proceedings in the High Courts and Magistrates Courts of Lagos State. Some other states³ are proposing to enact similar laws on administration of criminal justice.

The administration of criminal justice involves several stages. The principal ones are: investigation, arrest of a suspect, detention, charge and arraignment, bail, prosecution, imprisonment, discharge and/or acquittal. Each of these stages will be considered briefly.

³ Notably Imo and Ondo States are in the process of enacting a similar law. It is envisaged that the Federal Government too would do the same having developed a Bill to that effect. The movement towards the modernisation of criminal procedure laws in the country gained momentum around 2003 when Chief Akin Olujimi, SAN as Attorney-General of the Federation and Minister of Justice set up a National Working Group on the Reform of Administration of Criminal Justice under the chairmanship of Chinonye Obiagwu, the National Coordinator of Legal Defence and Assistance Project (LEDAP). Supported by the MacArthur Foundation, this Group which included representatives of states, Federal Government, Police, Prisons, Judiciary, etc produced a draft bill on Administration of Criminal Justice. A similar Bill initiated by Lagos State was later passed into law in 2007. The Federal Government is now reviewing the ACJ Bill with a view to passing it into law. It proposes a uniform mode of commencing criminal proceedings across the country as follows: in magistrates courts, by a charge, in the High Courts by information, by information filed in the court after the defendant has been summarily committed for perjury by a court under the provision of this Act and by complaint to a court, whether or not on oath. (see sections 102 and 103 of the Administration of Criminal Justice Bill 2011, on file at the Department of Legal Drafting, Federal Ministry of Justice, Abuja). This Bill makes far-reaching provisions which would address many of the bottlenecks in the criminal procedure system in the country. However, it preserves many of the provisions of the Criminal Procedure Code and the Criminal Procedure Act both of which are now fused into a common procedural law to be known as Administration of Criminal Justice Act, when passed by the National Assembly. States of the Federation are expected to pass a similar law to regulate criminal proceedings in state offences. Lagos State has already gone ahead by enacting the Criminal Justice Administration Law in 2007 and an improved version of it in 2011. At the Federal level, the Panel on Administration of Justice Reform appointed in 2011 by the Attorney-General of the Federation and Minister of Justice, Mohammed Bello Adoke, SAN has adopted the Bill as one of those to be pursued vigorously for passage before the end of the current legislative term.

3.2 INVESTIGATION

When the Police receive a petition, a complaint or facts that create suspicion of the commission of a crime, the first thing to do is to commence an investigation. An investigation also ought to be conducted (this may be as to the motive of the suspect, the circumstances that may include self defence etc, the likelihood of the existence of conspirators or other principal offenders etc) even where the police arrested the suspect while the suspect was committing the crime. An investigation is “to search or inquire into with care and accuracy.”⁴ So the proper process where the suspect was not arrested while committing the crime, is to conduct an investigation (starting discreetly; and the suspect may be questioned but not arrested or detained), and if there is reasonable ground(s) (established from the investigation) then the suspect may then be arrested and charged, and then immediately charged in court. This is the only way to protect the rights of citizens particularly since the Constitution presumes the innocence of every suspect. On the contrary, this fair hearing and rights based standard approach to criminal processes is almost always breached by the Nigeria Police. In practice, once a petition or complaint is received or there is the slightest suspicion of the commission of a crime, the suspect is arrested and charged and detained in the police station until he or she is able to pay bribes for bail. Even after many days or weeks of detention, the suspect may never be charged in court, because subsequent investigations will not disclose the commission of a crime on the part of the suspect. Sometimes, in order to meet the standard of the Constitution, the suspect may just be charged in court (and in capital offences the court will likely detain the suspect indefinitely or until the opinion of the Director of Public Prosecutions is received) and the case adjourned from month to month, year to year because the Police is yet to conclude investigation- a fragrant abuse of the rights of the suspect.

⁴ See *Chambers Dictionary*.

3.3 ARREST

Arrest consists of ‘a seizure or forcible restraint’. The taking or keeping of a person in custody by legal authority, especially in response to a criminal charge like apprehension of someone for the purpose of securing the administration of the law, especially of bringing that person before a court⁵.

Arrest is an abridgment of the right to personal liberty guaranteed to everyone by section 35 (1) of the Constitution of the Federal Republic of Nigeria 1999. Article 6 of the African Charter on Human and Peoples Rights also reinforces the constitutional protection of the rights to personal liberty. It provides that “every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law”.

These provisions are primarily aimed at protecting individuals from unlawful deprivation of their freedom through abuse of power by law enforcement officials and security agencies. The most common violation of this provision is in relation to the abuse of police powers of arrest and detention.⁶

These laws recognize some circumstances under which an arrest could be made. Section 35(1) (g-f) of the 1999 Constitution provides for such instances when arrest could be made. Thus arrest is used mainly to compel the attendance of a suspect at a police station or court. It could be carried out by a law enforcement officer upon reasonable suspicion that a person has committed a crime. Sections 24 and 25 of the Police Act stipulate that a police officer can lawfully arrest any person whom he reasonably suspects to have committed an offence. In other words, whenever a police officer reasonably suspects that a crime has been committed, he has a duty to arrest the suspect. What the police officer

⁵ Black’s *Law Dictionary*, (8th Edition) 2004

⁶Akinseye-George, Y., (2011) *Improving Judicial Protection of Human Rights*, Abuja, (Centre for Socio-Legal Studies) p. 124

“suspects upon reasonable grounds” is subject to an objective test: Given the same circumstances, would a reasonable man acting without passion or prejudice suspect that an offence has been committed?⁷

Anyone who obstructs a police officer while in execution of his lawful duty may equally be arrested. Arrest may be made with or without a warrant of arrest. But it must always be in compliance with the law.

3.3.1 THE PROCESS OF ARREST

Apart from the constitution which is the fundamental law governing arrest, other laws on this subject include the Criminal Procedure Act,⁸ Criminal Code⁹, the Administration of Criminal Justice Law of Lagos State¹⁰, and section 24(1) of the Police Act.¹¹ Arrest must be in compliance with the provisions of these laws.

Generally, the law requires the officer making an arrest to touch or confine the body of the person to be arrested, unless there is a submission to custody by word or action.¹² The officer before arresting must identify himself or herself properly where possible. In *Sadiq v the State*¹³ the appellant was invited by a police officer to the police station for questioning over the commission of an alleged offence. But she refused. Other officers were sent to her. They eventually convinced her and she went with them to the

⁷Osamor, B.,(2004) *Fundamentals of Criminal Procedure Law in Nigeria*, Lagos, Dee-Sage Nigeria Ltd, p. 49

⁸Op. cit. sections 3, 4, and 10 applicable in the Southern States of Nigeria. Equivalent provisions of the Criminal Procedure Code (applicable in the Northern States) can be found in chapter iv

⁹ Section 37

¹⁰Sections 1, 2, 3 and 4. It is noteworthy that section 4 the Criminal Justice Administration Law of Lagos State specifically prohibits the practice of arrest in lieu

¹¹ Cap. P.19 Laws of the Federation of Nigeria, 2004, s.24 (1)

¹² See section 3 of the Criminal Procedure Act.

¹³ (1982) 2 NCR 142

police station. She was subsequently charged and convicted *inter alia* of the offence of resisting police arrest.

Her conviction was quashed and upheld on further appeal. The court opined that the appellant was never arrested by the police officers because there was no restraint of the appellant. The court further stated that mere words cannot constitute an arrest under the law, unless accompanied by some form of restraint. Therefore, since there was no arrest in law, the appellant could not have resisted arrest.

The person arrested must be informed in the language s/he understands of the reason(s) for the arrest¹⁴ except where the person to be arrested was in actual commission of a crime or pursued immediately after the commission of a crime or escaped from lawful custody. A law enforcement agent making an arrest is permitted to use such force as may be reasonably necessary and conduct a search on the suspect in order to obtain any offensive weapon that may be on the person. But a person arrested shall not be handcuffed, bound or be subjected to unnecessary restraints except by order of court or upon a reasonable apprehension of violence or an attempt to escape.¹⁵

Judicial officers can also order an arrest. Sections 15 and 16 of the CPA provide that when an offence is committed in the presence of a judicial officer (Magistrate or Judge) within his district/division or upon a complaint, the judicial officer may arrest or order any person to arrest the offender. Similarly, under the Criminal Procedure Code a Justice of the Peace can also order an arrest¹⁶.

¹⁴ Section 35(3) of the Constitution of the Federal Republic of Nigeria, 1999

¹⁵ Section 4 C.P.A. and 37, C.P.C

¹⁶ Section 30 of the C.P.C. A Justice of Peace is a local judicial officer having jurisdiction over minor criminal offences and minor civil disputes. The Criminal Procedure Code recognises a Justice of the Peace.

Furthermore, a private person is empowered to arrest any person who commits an indictable offence in his presence.¹⁷ A private person may also arrest any person found damaging public property.¹⁸ Section 13 of the C.P.A empowers a property owner, his servant or agent to arrest without warrant any person found committing an offence involving injury to his property. The authority of a private person to effect an arrest without warrant was judicially recognized by the Supreme Court in the case of *Nweke v The State*¹⁹ where the Supreme Court held that a private person can arrest without warrant any person whom he reasonably suspects of having committed a felony.

Sections 14 of the C.P.A and 39 of the C.P.C. direct that where a private person exercises his power to arrest an offender, without warrant of arrest, he must proceed, without unnecessary delay to hand over the arrested person to a police officer or take the arrested person to the nearest police station.

Any threat used by a private person to arrest is not unlawful but where he fails to comply with the requirement of handing over, he may be liable for false imprisonment.²⁰

The Administration of Criminal Justice Law of Lagos State makes similar provisions as the CPA and the CPC on arrest.²¹ However, it introduces some novel provisions pertaining to arrest protocol. Thus a Police Officer or the person making the arrest or the Police Officer in charge of a Police Station or any Law Enforcement

¹⁷ Sections 12 C.P.A and 28 (d) C.P.C. See also section 13 of the Administration of Criminal Justice Law of Lagos State

¹⁸ See section 13(2) of the Administration of Criminal Justice Law of Lagos State

¹⁹ (1965) 1 All NLR. 114. Any defect in the process of arrest (such as arresting without warrant when warrant is required) merely makes the arrest unlawful but it does not affect the validity of the trial: *Okotie v C.O.P* (1959) 4 FSC 125. Also section 101 CPA

²⁰ Osamor, B. op. cit. pp. 54-55

²¹ Section 10 of the Administration of Criminal Justice Law of Lagos State 2011

Agent, shall inform the person arrested of his rights to: (a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice; (b) consult a counsel of his choice before making or writing any statement or answering any question put to him after the arrest; (c) refuse to answer any question or make or endorse any statement. Further, the Police Officer or the person making the arrest shall inform the person arrested that he may apply for free legal representation from the Office of the Public Defender, Legal Aid Council or any such agency. The Commissioner of Police shall remit to the Office of the Attorney-General a record of all arrests made with or without a Warrant in relation to state offences within one week of the arrest and the office of Attorney-General shall within one week of the receipt of the records of arrest provide the Commissioner of Police with legal opinion on the appropriate actions to be taken in respect of the state offences. The record of arrest is defined to include pictures, finger prints, samples, biometric details, names, addresses, and other relevant information about the person concerned.²²

3.3 POLICE DETENTION (PRE-TRIAL)

After an arrest has been made by the police, it is the practice of the police to take the person arrested to a police station either for questioning or for further investigation or to prevent the suspect from committing another offence. The law stipulates that a suspect must be charged to a court of law within a reasonable time or be granted bail. In *Anekwe v Michael Aniekwensi and others*,²³ the applicants instituted an action at the High Court Anambra State for the enforcement of their fundamental rights under the 1999 Constitution and the African Charter. The reliefs sought included a declaration that their arrest and detention by the Nigerian Police at the instigation of the 1st respondent was unlawful, unconstitutional and a gross violation of their fundamental rights. The applicants'

²² Section 3 (2) and (3) and section 10 (2) and (4), Administration of Criminal Justice Law of Lagos State 2011,

²³ (2009) 10 N.M.L.R 18

position was that they were involved in a land dispute with the 1st respondent. According to them, the first respondent at different times made false statements to different divisions of the police alleging that the applicants maliciously damaged his properties. The court held that an applicant alleging a breach of his fundamental human rights has the duty to place before the court all crucial evidence regarding the breach complained of; failure to do this is fatal to the application and the trial court can strike out such application for want of merit. Sections 35 (1) (c) of the 1999 Constitution and 20 of the Police Act confer on the police the power to arrest and detain any one reasonably suspected to have committed a criminal offence. It is when the police detains and fails to charge a person to court after the period prescribed in Section 35 (4) of the constitution that an infringement occurs. Ozor J. stated:

Section 35 (1) (c) of the 1999 constitution clearly shows that a person may be denied his fundamental right to liberty if there is reasonable suspicion of his having committed an offence;

If there is reasonable suspicion that a person has committed an offence, his liberty may be impaired temporarily. In the same vein, a person's liberty may be tampered with so as to prevent him from committing an offence. In short, it is clear that no citizen's freedom or liberty is absolute. The freedom or liberty of a citizen ends where that of the other starts...

Under the 1999 Constitution, section 35 (4) stipulates that any person who is arrested shall be brought before a court, within a reasonable time. Subsection (5) explains what is meant by "a reasonable time" as: (a) in the case where there is a court of competent jurisdiction within forty (40) kilometres, reasonable time is one day, and (b) in any other case, a reasonable time is two days or such longer period as in the circumstances may be considered to be reasonable by the court.

Owing to the limited investigative capacity and other resource constraint experienced by the police in this country and also for reason of corruption, they often exercise their arrest power arbitrarily merely for the purpose of investigating an offence or obtaining information from the person so arrested often without reasonable suspicion of involvement in a crime. This practice is clearly in violation of section 35(1)(c) as the suspect is detained arbitrarily at the police station without any charge being preferred against him or her. In the case of *Bayo Johnson v Attorney General of Lagos State*,²⁴ the police power of arrest, detention and arraignment were juxtaposed with the citizen's right to personal liberty under the 1999 Constitution. Here, the appellant was arrested and detained at Force Criminal Investigation Department (FCID), Alagbon, Lagos. He was charged with 11 others before a Chief Magistrate Court for conspiracy to commit treason and treasonable felony. An application for bail was made but was refused by the magistrate. An application was then made to the high court but the court refused the application. On appeal, the Court of Appeal held that before an accused is brought before the court it is assumed that the case is ripe for hearing and not further investigation. He must not be there on mere suspicion that cannot be regarded as reasonable suspicion under Section 35 of the 1999 constitution. Thus, the application for bail was granted.

3.4 CHARGE AND ARRAIGNMENT

3.4.1 CHARGE

When an offence is committed and a suspect is identified and arrested, the next step is to charge the suspect to court. A charge is a formal way of bringing a suspect to court. It is 'a formal accusation of an offence as preliminary step to prosecution'.²⁵ Section 2 of the Criminal Procedure Act defines a charge as "the

²⁴ (unrep.) Judgment of the High Court of Lagos State), see Akinseye-George, Y., (2011) *Improving Judicial Protection of Human Rights in Nigeria* op. cit. p. 135

²⁵ *Black's Law Dictionary*, 8th Edition, 2004

statement of offence or statement of offences with which an accused is charged in a summary trial before a court.” A charge in whatever form must inform both the defendant and the court in clear term the offence for which the defendant is to be tried. In this respect, Section 36(6)(a) of the Constitution of the Federal Republic of Nigeria, 1999 is apt. It provides that every person who is charged with an offence shall be entitled to be informed promptly in the language he understands and in detail the nature of the offence with which he is charged. Although this requirement of the Constitution concerns the first stage at which time a defendant is charged, it also reinforces the provision of section 215²⁶ of the Criminal Procedure Act which is aimed at ensuring fair hearing and trial of the defendant.

The charge must provide sufficient information about the offence with which the defendant is charged and the statutory provision creating the offence. In other words, the defendant must not in any way be misled by the words or style in which the charge is drafted. In *Timothy v Federal Republic of Nigeria*²⁷ the appellant was arraigned before the Federal High Court Abuja, on a one-count charge of unlawful importation of cocaine. He initially pleaded not guilty to the charge, but when the prosecution opened its case and called a witness, the appellant through his counsel indicated his intention to change his plea. The trial judge directed that the charge be read to him again and his plea taken afresh. The charge was read to him and he pleaded guilty. Based on his plea of guilty and the exhibits in evidence, the appellant was convicted as charged and sentenced to four years imprisonment. The appellant being dissatisfied appealed against the judgment of the trial court. He contended that the learned trial judge failed to adhere strictly to the provisions of section 218 of the Criminal Procedure Act, in that when his plea was taken initially, there was compliance with the provisions of section 218 but with respect to the second plea, there

²⁶ Section 215 of the CPA provides that the person to be tried upon a charge or information must be informed of the charge

²⁷[2008] All FWLR (Pt. 402) 1136

was non-compliance with the provisions of the law because the charge was not explained to him. The appellant further argued that there was an omission of word “Act” in the citation of the statute stipulating the offence with which he was charged and that makes the charge invalid. The Court of Appeal, per Omoleye, JCA, delivering the lead judgment held as follows:

The system of criminal justice in Nigeria requires that the contents of a charge should not be subject of speculation and inference; rather, the essential ingredients of the offence must be disclosed in the charge. This is an inalienable right of an accused person. See section 36(6)(a) of the 1999 Constitution. It is settled law that a charge must be provided for by statute. Where a charge has been framed in accordance with the format of the relevant law, explaining the offence alleged to have been committed and spelling out the elements of that offence in good, lucid, precise, specific and readily understandable language, it is regarded as substantially proper and valid...

In the instant case, the appellant in my opinion throughout the proceedings clearly understood and knew the complaint against him. If it were not so, he ought to have protested vide his counsel at the earliest opportunity and at the time he was being tried in the lower court. Indeed, it is firm my view that the fact of his clear understanding of the charge and the evidence adduced by the prosecution, informed his change of mind to withdraw his earlier plea of not guilty. Thereafter, he pleaded guilty as he deemed appropriate. The omission of the word “Act” from the citation of the law under which the appellant was charged is an irregularity, it is however not fatal so as to void his trial and conviction.

Nowadays, the courts have shifted away from the orthodox method of narrow technical approach to justice. The weight of judicial opinion is now predominantly in favour of the court doing substantial justice rather than undue adherence to rules of court and

technicalities. It is therefore, only where there was substantial error which has occasioned miscarriage of justice that the appeal of court will interfere.

The Court of Appeal dismissed the appeal and affirmed the decision of the trial court.

3.4.2 MODES OF CHARGING A SUSPECT TO COURT

There are different modes by which a suspect may be charged in court or of instituting criminal proceedings against a suspect. Each mode depends on two factors, namely:

- (a) The court before which the criminal proceeding is instituted, and
- (b) Whether the court is in the Southern or Northern States of Nigeria.

3.4.3 COMMENCEMENT OF CRIMINAL PROCEEDINGS IN MAGISTRATE COURTS IN THE SOUTHERN STATES

There are two modes of commencing criminal proceedings in the Magistrate Courts in the Southern States. These methods are:

(1) Laying a complaint before a Magistrate Court

Criminal proceeding can be commenced by laying a complaint at the Magistrate Court whether on oath or not, alleging that an offence has been committed by any person. This is pursuant to section 78(a) of the Criminal Procedure Act. The Magistrate must have the authority to compel the attendance of the alleged offender for the trial either through a summons or warrant of arrest. The complaint must be accompanied by an application in the prescribed form for the issuance of summons or warrant of arrest. Section 60(3) of the Criminal Procedure Act provides that a complaint may be made by the complainant in person or by a legal practitioner representing him. A complaint can be made orally or in writing. However, where it is made orally it must be reduced into writing,

either by the court or the Registrar of the court.²⁸ Furthermore, a complaint may be made without an oath except where the law creating the offence so requires. However, where a complaint requires a warrant of arrest to be issued against the defendant, then such a complaint must be on oath.

Usually where a complaint discloses facts, which constitute a criminal offence, the court shall issue a summons or warrant of arrest and try the alleged offender. If the court refuses to entertain the complaint, the complainant can apply for an order of mandamus compelling the court to entertain the complaint.

(2) Preferring a charge before a Magistrate Court

This under section 78(b) of the C.P.A. where police officers are authorised to institute criminal proceedings by bringing any person arrested without warrant before a Magistrate's Court on a charge signed by a police officer. The charge sheet must contain basic information such as:

- i. the name and the occupation of the person charged,
- ii. the offence the person is alleged to have committed
- iii. the time and the place the offence is allegedly committed, and
- iv. signature of a police officer.

This is the commonest mode of commencing a criminal proceeding in the Magistrate court in the Southern parts of the country. A law officer or state counsel, in exercise of the powers of the Attorney-General can also draft and sign a charge sheet that is intended to be used in the Magistrate Court. In *State v Okpeghoro*²⁹ the defendants were charged with murder and arraigned before a Magistrate Court for preliminary inquiry on a charge drafted and signed by a pupil state counsel. The charge was however subsequently withdrawn and fresh information was filed at the

²⁸ See section 60(1) C.P.A.

²⁹ (1980) 2 N.C.R. 291

High Court. The defendant applied to the High Court to strike out the information contending that pursuant to section 78(b) of the C.P.A. the charge at the Magistrate's Court ought to have been signed by a police officer. The court held that the authority of the police officer to sign charges under section 78(b) C.P.A. was subject to the authority of the Attorney-General under the Constitution and that a pupil counsel being an officer in the Attorney-General's department has power to draft and sign a charge intended for use in any court of law.

3.4.4 COMMENCEMENT OF CRIMINAL PROCEEDING IN MAGISTRATE COURTS, AREA COURTS AND CUSTOMARY COURTS IN THE NORTHERN STATES

Criminal proceedings may be commenced in the Magistrate Courts in any of the following ways:

(1) Laying a First Information Report (F.I.R.)

This is in accordance with section 143(b) of the Criminal Procedure Code which empowers the Magistrates Court to take cognizance of an offence upon receiving a First Information Report (F.I.R.) filed by the Police. Usually when the Police are informed of an alleged offence and the offence is, (i) one for which the police can arrest the alleged offender without warrant, and, (i) tried by a court within the local limits of whose jurisdiction the police station is located, the Police must first reduce the information into writing, if it is given orally, in the prescribed form called the First Information Report (F.I.R.). The information whether given orally or in writing must be read over to the informant who thereafter signs or seals the information.³⁰

Also, under section 117 (2) of the CPC, when on any other ground a police officer who is in charge of a police station has any reason to suspect that an offence has been committed for which the police

³⁰ See Section 117(1) C.P.C.; Osamor, B, *op.cit.* p.138; Agaba, J.A,(2011), *Practical Approach to Criminal Litigation in Nigeria*, Abuja, Law Lords, pp.358-360.

can arrest without warrant and is capable of being tried by a court within the local limits of whose jurisdiction the police station is situated, he can cause to be entered the ground of his suspicion in a First Information Report (FIR).

The FIR and the alleged offender are then taken before a Magistrate Court within the local limits of whose jurisdiction the police station is situated. The Magistrate Court may either ask the Police Officer to investigate further or proceed to hear the information. By section 157(1) of the C.P.C. the Magistrate Court is authorised to hear preliminary evidence from the prosecution. If the alleged defendant admits the commission of the offence contained in the F.I.R., his admission shall be recorded as near as possible in the words used by him. The alleged offender may be convicted and sentenced by the court without a charge being framed. This procedure is known as the Short Summary Trial Procedure.

However, if the alleged offender denies the commission of the offence contained in the FIR, the court must proceed to hear the testimony of the prosecution witnesses and their cross-examination by the alleged offender. Thereafter if the court is of the opinion that there is a *prima facie* evidence that the defendant committed the alleged offence, the Magistrate then frames a charge against the defendant and proceeds to try him on the said charge pursuant to section 160(1) of the C.P.C.

If at any stage during the trial but before the signing of the judgment, it appears to the Magistrate that the case is one which ought to be tried by the High Court, he shall frame a charge and commit the offender for trial at the High Court.³¹

The conduct of a preliminary inquiry by the Magistrate Court is mandatory whenever a First Information Report is filed by the

³¹ See section 160(2) & (3) of the C.P.C

Police: *Harunami v Borno Native Authority*.³² The Magistrate Court in the instant case framed a charge of theft against the alleged offender, without conducting a preliminary inquiry. The defendant was tried and convicted on the said charge. On appeal, the defendant's conviction was quashed on the ground that the trial court ought to have conducted a preliminary inquiry before framing the charge.

This procedure of conducting a preliminary inquiry by the Magistrate, framing of charges and thereafter commencement of trial against an offender on the same was challenged in the case of *Ibeziako v Commissioner of Police*.³³ The Magistrate Court in the instant case received evidence from the prosecution and thereafter framed a charge against the defendant. The defendant was convicted. He appealed against his conviction contending that the Magistrate Court had violated his right to presumption of innocence as enshrined in the constitution. He further argued that before the Magistrate Court framed the charges against him, he must have presumed that he was guilty of the alleged offence. The Court held that the pre-trial evaluation of the evidence of the prosecution witnesses is only directed at establishing the existence or otherwise of a prima facie case against the accused person. Consequently the procedure adopted by the Magistrate Court did not violate the accused person's right to the presumption of innocence.

Where a Police Officer refuses to accept information on the ground that the prosecution will not serve the public interest, it is required that he notifies the informant in writing of his right to complain to a court under section 143 of the C.P.C.

(2) Laying a complaint before a Magistrate Court

This method of instituting criminal proceedings gives a complainant whose complaint has been refused by the Police or a

³² (1967) N.N.L.R. 19

³³ (1963)1 All N.L.R. 61

complaint not in the prescribed form called the First Information Report to lay a complaint to the Magistrate Court either orally or in writing. This procedure is provided for under section 143 (e) of the C.P.C. as follows:

Subject to the provision of chapter 13 and 14 and to any other limitation on the powers of the court, a court may take cognizance of an offence-

(e) If from information received from any person other than a police officer it has reason to believe or suspect that an offence has been committed.

(3) Area Courts

As far as the area courts in the Northern States are concerned, criminal proceedings are also commenced by First Information Report (FIR) as in the Magistrates courts and also by complaint. In the Customary courts, the method is by bringing a person arrested without a warrant before a customary court judge together with a charge duly signed by the police officer or by the complainant.

3.4.5 INSTITUTION OF CRIMINAL PROCEEDINGS AT THE HIGH COURTS

A. SOUTHERN STATES (EXCEPT LAGOS ANAMBRA STATES)

(1) Filing an information in the High Court after obtaining the consent of the Judge:

Criminal proceedings may be instituted in the State High Courts of any of the Southern States by filing an information against any person alleged to have committed an indictable offence.³⁴ Information in this context means a formal criminal charge which

³⁴ By section 2 of the CPA 'indictable offence' is any offence which on conviction may be punished by a term of imprisonment exceeding two years or by imposition of a fine exceeding four hundred naira. Indictable are tried on information but may be tried summarily in certain circumstances. See section 304 of the CPA.

contains the statements and punishment of the offence for which a person is to be tried. This procedure is in accordance with sections 77 (b), 340 (2), 342 and 343 of the C.P.A. However the consent or direction of the judge (except in the Southern Eastern States, ie states of the former East Central States Nigeria)³⁵ must first be sought and obtained before such information can be duly filed. Failure to obtain the consent or direction of a High Court Judge before filing an information renders the information defective both in form and in substance. Consequently, the courts may either on its volition or on the application of the defendant quash the information in accordance with section 340(3) of the C.P.A. In *Attorney-General of the Federation v Isong*³⁶, the defendant was charged on information containing two-count charge of being in possession of firearms and ammunition but consent of the High Court Judge was not obtained. The defendant applied to quash the information based on the failure of the prosecution to obtain consent. The court upheld the defendant's contention and quashed the information. It is not enough to obtain the consent of the Judge when an information is filed; the information must also disclose a prima facie case³⁷ against the defendant based on the proof of evidence.

³⁵ See for example, the East Central States Criminal Procedure (Misc. Provisions) Edict 1974 that abolished the requirement of consent in.

³⁶ (1986) 1 Q.L.R.N. 75. See also the case of *Okafor v State* (1976) 1 All NLR (Pt.1) 385. In *State v. Akilu & Anor*, (unreported Suit No. ID/4C/88) information filed by Chief Gani Fawehinmi, a private prosecutor containing 2 counts of conspiracy to murder and murder of the late Journalist Dele Giwa preferred against two national security chiefs (Halilu Akilu and A.K. Togun) without the prior consent of a High Court judge was quashed for being an abuse of court process. See Agaba, op cit. p.362.

³⁷ In *Ajidagaba v IGP* (1958) 3 FSC 5 the Federal Supreme Court defined the term simply as 'ground for proceeding'. 'It only means that there is ground for proceeding...But a prima facie case is not the same as proof which comes later when the court has to find whether the accused is guilty or not guilty...and evidence discloses a prima facie case when it is such that if not contradicted and if believed, it will be sufficient to prove the case against the accused. See also *Ajiboye v State* (1994) 8 NWLR (Pt. 364) 587; *Ikomi and ors v The State* (1986)5 FSC 313; (1986) 3 NWLR (Pt.28) 340 – The Supreme Court upheld the finding of the two lower courts that the proofs of evidence disclosed a prima

(2) Laying a complaint before a High Court Judge

Criminal proceedings can also be commenced in the Southern States in the High Court by laying a complaint. In this case it is not necessary to obtain the direction or the consent of the judge but the offence in the complaint must be solely for a non-indictable offence.³⁸ In *Aluko v Director of Public Prosecution, Western Nigeria*³⁹ the appellant was arraigned and convicted in the High Court on a complaint containing an allegation of a non-indictable offence of sedition. The appellant on appeal against his conviction contented that the High Court has no jurisdiction to try a non-indictable offence. The court in dismissing the appeal held that the High Court has jurisdiction to try the offence and that the appellant was properly arraigned before the court by way of complaint.

(3) Filing information for the offence of perjury at the High Court after a perjurer has been tried summarily

facie case against the accused persons in respect of the offence of murder of a police constable with which they were charged. The Attorney-General of Bendel State obtained the consent of the Chief Judge before filing the information against the accused persons/appellants. The appellants brought an application through their counsel, Chief Rotimi Williams, SAN to quash the information on the ground that there was no prima facie case disclosed. The application was refused. However, in *Abacha v State* (2002) FWLR (pt.98)863; (2002) FWLR (Pt.118) 1224 the Supreme Court by majority decision arrived at a somewhat curious decision inconsistent with the principle in *Ikomi* without expressly overruling *Ikomi*. Ejiwumi, JSC in his dissenting opinion castigated the majority decision thus: 'On the facts here, except *Ikomi v. The State (supra)* is not being followed; the proper order to make is to dismiss the appeal. The facts here are glaringly much stronger than in *Ikomi* where this court refused to quash the information and ruled that *Ikomi* must face his trial. To hold otherwise, is in my respectful view, to submit to the tyranny of the majority in its capricious interpretation of settled principles laid down in *Ikomi*...'

³⁸ Non indictable offence is any offence that does not fall under the meaning indictable offence. In other words non indictable offence is any offence which upon conviction may be punished by a term of imprisonment not exceeding two years or by imposition of a fine that is below four hundred naira. This offence may be tried summary and normally not on information.

³⁹ (1963)1 All NLR 398,

This is provided for under sections 274 of the CPA and 77(b) (ii) of the Administration of Criminal Justice Law of Lagos State. The offence of perjury can be tried summarily by the court as if the alleged perjurer had committed the offence of contempt of court. Alternatively, the case could be reported to a law officer who would then decide whether or not to file an information against the alleged perjurer.⁴⁰

B. NORTHERN STATES

(1) Laying a complaint

Criminal proceedings can be instituted in the Northern States by laying a complaint before a judge of the High Court whether on oath or not. This is contained in section 143(d) of the C.P.C. The consent of a judge is not required to file this complaint.

(2) Preferring a charge with the consent of a judge

Under section 185 of the Criminal Procedure Code criminal proceedings may also be instituted in a High Court by preferring a charge against the defendant for an alleged offence with the consent of a judge. This is the commonest mode of instituting criminal proceedings in the Northern States at the High Court. Usually, the charge is drafted and signed by a law officer. The charge preferred in the High Court must not be for an offence that can only be tried by a High Court. This is pursuant to section 12(1) of the CPC which provides that any offence that can be tried by a magistrate's court can also be tried by a High Court. In *Gaji v State*⁴¹ a law officer brought an application before a High Court Judge to prefer charges against the defendant for culpable homicide. The Judge refused to grant leave on the ground that a Magistrate's Court can try the alleged offence and that the same application having been refused by a High Court Judge could not be brought before another High Court Judge.

⁴⁰ Doherty, O., (1990) *Criminal Procedure in Nigeria: Law and Practice* (London, Black Stone Press Ltd) p. 76

⁴¹ (1975)5 S.C. 61

On further appeal, the court held that any offence whether it can be tried by the Magistrate Court or not can also be tried by the High Court. On the issue of application, the Court held that the same application for consent may be made before as many Judges as the applicant is willing to apply to.

This mode of instituting criminal proceeding by preferring charges with the consent of a judge is similar to the procedure in the Southern States where a judge's consent must be obtained before an information can be filed.

(3) Filing an information:

Criminal proceedings can also be instituted in some of the Northern States High Courts of Adamawa and Taraba States by way of information, where the provision of section 185(b) of the C.P.C. has been amended. The consent of the Judge must be obtained before such information could be filed.⁴²

C. INSTITUTING CRIMINAL PROCEEDINGS IN THE FEDERAL HIGH COURT

In the Federal High Court there is only one mode of instituting criminal proceedings. This is by filing a charge against the defendant for an alleged offence before the court. The charge must be accompanied by the proof of evidence against the defendant. There is no requirement of obtaining the consent of a judge. The practice and procedure that is applicable to the Federal High Court in criminal cases is the Criminal Procedure Act.⁴³ Under the Federal High Court Act the Attorney-General of the Federation is the sole authority who may institute criminal proceedings in the Federal High Court and he does this either personally or through law officers in his department or by issuing a fiat to any person or

⁴² Osamor, B., *Op. Cit.* P. 148

⁴³ By virtue of section 32(2) of the Federal High Court Act, the Federal High Court is a court of summary trial.

agency; but see the Supreme Court in *F.R.N v Osahon*⁴⁴ where it held that the Police could initiate criminal proceedings in the Federal High Court despite the clear wording of section 56(1) of the Federal High Court Act which vests in the Attorney-General of the Federation the exclusive power to authorise the initiation of criminal proceedings in the Federal High Court.⁴⁵ It should be noted that there is no requirement of the consent or direction of the judge of the Federal High Court before a charge can be filed.

D. INSTITUTING CRIMINAL PROCEEDINGS IN LAGOS STATE

With respect to Lagos State it is provided by section 77 (1) of the Administration of Criminal Justice Law (ACJL) 2011, that Subject to the provision of any other enactment, criminal proceedings may in accordance with the provisions of this law be instituted (a) summarily in Magistrates Courts on a charge in respect of simple offences, misdemeanours and felonies; (b) in the High Court- (i) by information of the Attorney-General of the State in accordance with the provisions of section 69 of the ACJL; and (ii) on information, filed by a private prosecutor pursuant to section 254; or (iii) by information filed in the court after the accused has been summarily committed for perjury by a Judge or Magistrate under the provisions of section 299 of the ACJL or (iv) summarily in respect of contempt. Section 77 (2) provides that in all other trials in Magistrates' Court involving a felony the prosecution shall, on request, give the defendant statements of witnesses and report of experts that the prosecution intends to rely on at the trial, before or at the commencement of the trial. Furthermore, under section 78(1) proceedings in a Magistrates' Court may be instituted by bringing a person arrested with or without a warrant before the Court upon a charge contained in a charge sheet specifying the name and occupation of the person charged, the charge against him and the

⁴⁴ [2006] 5 NWLR (Pt. 973)

⁴⁵ For a perceptive analysis of this decision see Ajayi, Konyinsola, SAN, (2009) 'Revisiting the Police Power to Prosecute: A Critique of *Federal Republic of Nigeria v. George Osahon and 7 Ors*', in *The Appellate Review*, Volume 1. p.67. The learned author contends that the decision is erroneous.

date and place where the offence is alleged to have been committed. It is required by section 78 (2) that the charge sheet shall be signed by a Law Officer or the Police Officer in charge of the case. Also, under section 79, a Magistrate may issue a summons or warrant as set out to compel the appearance before him of any person alleged of having committed in any place whether within or outside Nigeria, any offence triable in the State. Further reinforcing the powers of the court over criminal proceedings, section 80 makes it clear that in every case, the Court may proceed by way of summons to the defendant or by way of warrant for his arrest in the first instance according to the nature and circumstances of the case.

E. INSTITUTING CRIMINAL PROCEEDINGS IN ANAMBRA STATE

It is provided by section 174 of the Administration of Criminal Justice law (ACJL) 2010 of Anambra State, that subject to the provisions of any Act or other laws, criminal proceedings may in accordance with the provisions of this law be instituted, (a) in Magistrates' Court, on a charge or a complaint whether or not on oath; and (b) in the High Court as follows:

- (i) by information of the Attorney- General in accordance with the provisions of section 173;
- (ii) by information, filed in the Court after the defendant has been summarily committed for perjury by a judge or magistrate under the provisions of Chapter 13 of the law;
- (iii) by information filed in the court after the preparation of the proofs of evidence; and
- (iv) on complaint whether on oath or not.

Also by information by private persons in accordance with section 223, the registrar shall receive information from a private person if- (a) such information is endorsed by the Attorney-General to the effect that he has seen such information and declines to prosecute the offence set out in the information. In addition to section 174

(a), section 175 provides the particulars of instituting a case in Magistrates' Court as follows:

(a) upon complaint to the court, whether or not on oath, that an offence has been committed by any person whose presence the magistrate has power to compel, and application to such magistrate, in the manner hereinafter set forth for the issue of either a summons directed to, or a warrant to arrest such person;
or

(b) by bringing a person arrested without a warrant before the court upon a charge contained in a charge sheet specifying the name and occupation of the person charged, the charge against him and the time and the place where the offence is alleged to have been committed.

The charge sheet shall be signed by a law officer or police officer in charge of the case. Furthermore, under section 170, every complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before a court for any offence shall be sufficient if it contains a statement of the specific offence with which the defendant is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge. This reduces the scope of preliminary objections that may be raised to a defective charge.

Under the Anambra Law one cannot institute criminal proceedings summarily with respect to contempt; and there is provision for the filing of proof of evidence in seeking consent to institute proceedings in the High Court.

3.4.6 ARRAIGNMENT

Arraignment is the 'initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to plea.'⁴⁶The Criminal Procedure Act and the Criminal Procedure

⁴⁶ *Black's Law Dictionary* 8th Edition, op cit.

Code provide proper guide for a valid arraignment.⁴⁷ Thus section 215 of the Criminal Procedure Act stipulates:

- a. That the person to be tried must be brought before the court unfettered unless the court has cause to otherwise order.
- b. The charge or information must be read over and explained to the defendant to the satisfaction of the court by the Registrar or other officer of court, and
- c. The defendant shall then be called upon to plead.

This procedure is what is called arraignment. As soon as the defendant's plea is taken and it is recorded by the court, criminal trial has commenced. 'Arraignment therefore embodies the plea'⁴⁸. The statutory provision for arraignment is a reinforcement of the constitutional rights of a suspect accused of committing a crime. Thus section 36(6) of the 1999 Constitution provides that everyone who is charged with a criminal offence shall be informed promptly in the language he understands in detail the nature of his offence. The consequence of non-compliance with these laws renders the whole criminal trial a nullity as stated by the Supreme Court in *Yahaya v the State*⁴⁹, Per Uwais, CJN:

...it has been settled by this court in a plethora of cases that once the provisions of section 215 of the Criminal Procedure Law and those of the Constitution referred to above (i.e. section 36(6) (a) are not followed in a criminal trial, the trial is rendered null and void *ab initio*. All the other matters that follow thereafter amounts to an exercise in futility and are of no significance."

3.4.7 HOLDING CHARGE

In other jurisdictions 'Holding charge' as defined by the *Black's Law Dictionary* 'is a criminal charge of some minor offence filed

⁴⁷ See sections 215 of the CPA, 161 and 187 of the CPC

⁴⁸ Osamor, B., *op. cit.* p. 271

⁴⁹ (2002) 3 NWLR (Pt. 754) 289 at 303

to keep the accused in custody while the prosecutors take time to build a bigger case and prepare more serious charges'⁵⁰. In Nigeria 'Holding charge' is a criminal charge of a very serious offence that attracts capital punishment (death sentence) like, murder, and armed robbery by which a suspect is brought by the police before the magistrate that does not have jurisdiction to try such an offence for the purpose of receiving an order of court to continue to hold the suspect in detention while investigation continues or until the state decides whether to try the person for the offence or not. The concept of holding charge has no constitutional or statutory definition in Nigeria. It may be described as a judicial cover or blanket issued in favour of the police to protect it from violating the rights of the suspect particularly when the police are unable to investigate and prosecute crimes or offences or conclude investigation within the time frame allowed by law or just an abuse of the rights of a suspect who refuse or fails to pay bribes to the police. Niki Tobi, JSC, in *Onagoruwa v The State*⁵¹ in relation to holding charge stated as follows:

In a good number of cases the police in this country rush to the court on what is generally referred to as a 'holding charge' ever before they conduct investigation. Where investigation does not succeed in assembling the relevant evidence to prosecute the accused to secure conviction, the best discretion is to abandon the matter and throw in the towel.

Holding charge is therefore the practice whereby a person who is arrested for mainly offences that attract capital punishment (like armed robbery, murder, treason and in some jurisdictions, kidnapping) is taken before a Magistrate Court which does not have the jurisdiction to try such an offence. The Magistrate Court then issues an order remanding the suspect in police or prison custody pending investigation or a charge in court by the State through the Director of Public Prosecution or the Attorney-

⁵⁰ *Black's Law Dictionary* 8th Edition.

⁵¹[1993] 7 NWLR (Pt. 303) 49 at 107

General. In several cases, these suspects remain in custody for a very long time because the police prosecutors do not forward the case files to the Ministry of Justice for legal advice or because of delay on the part of the Ministry to arraign the suspects or issue legal advice to the police⁵² or court.

The Court of Appeal sitting in Ilorin made pronouncements on the impropriety of holding charge in Nigeria. In *Jimoh v Commissioner of Police*⁵³ the appellant was formerly on police bail but was arrested on one of his visits to the police station and arraigned before the Chief Magistrate Court, Ilorin on a First Information Report (FIR) alleging culpable homicide punishable with death contrary to sections 221 of the Penal Code and 1(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398, Laws of the Federation of Nigeria, 1990. The appellant's application for bail was refused by the learned Chief Magistrate Court. A similar application was made to the High Court but was also refused. The appellant further appealed to the Court of Appeal. The Court allowed the appeal and held as follows:
Per Onnoghen, JCA:⁵⁴

The issue to be determined is whether the learned trial court exercised its discretion judicially and judiciously having regard to the facts presented.

To begin with, the learned trial judge did hold at page 32 of the record as follows:

'In the instant case, from the affidavit evidence before me the applicant who had been on police bail was on one of his visits to the police station arrested and arraigned before the Chief Magistrate Court on the 17th of September, 2003. He has however not been arraigned before the court that has jurisdiction to try the alleged offence against him, hence the present application.'

⁵² Akinseye-George, Y., *Improving Judicial Protection of Human Rights in Nigeria*, op. cit p. 150

⁵³ [2005] All FWLR (Pt. 243) 648

⁵⁴ At Page 662, paras. D - H

The above finding clearly amounts to finding that the applicant was being detained on a “holding charge” as submitted by learned counsel for the appellant. In the case of *Enwere v C.O.P* (1993) 6 NWLR (Pt. 299) 333 at 341, this court held that a ‘holding charge’ is unknown to Nigerian law and that an accused person detained thereunder is entitled to be released on bail within a reasonable time before trial. Like in this case, the Chief Magistrate Court had no jurisdiction to try the case of murder, neither was there any charge of murder before the High Court at the time the application for bail was made and considered by the court.

The appellant was granted bail pending the determination of the allegation against him on the ground that there was no information or charge preferred against him, neither was there any proof of evidence from which the lower court could have weighed its decision on the issue of bail. The ruling of the High Court was set aside.

The holding charge phenomenon is one of the reasons for the congestion of Nigerian prisons. It is against this backdrop that the call is now being made for the review of the power of the Magistrate to make remand orders, as awaiting trial of persons constitutes 75% of the prison population and due to this congestion, prison facilities are stretched, inmates live in inhuman and most horrendous custodial environment.⁵⁵

It may be noted that ‘holding charge’ has become the norm for capital offences because section 35(7) excludes the oversight of section 35(4) and therefore permits the police to detain a suspect of a capital offence indefinitely. In that circumstance, sometimes the holding charge becomes an advantage to such a suspect. While the prison conditions are deplorable, the police detention houses are

⁵⁵ Quakers, Norrison L. , ‘Introduction to current Jurisprudence on the Rights to Fair Trial and presumption of Innocence: An overview of the Holding Charge Practice in Nigeria’ (Report of the 3rd Lagos State Attorney-General ‘s Forum) P. 27

horrible and inhuman. A detainee may be better off with a detention in the prison than with a detention in the police station. Also following public outcry, magistrate courts are now required in many states to monitor the cases of suspects detained on holding charges. This kind of oversight by the magistrates cannot happen if the police fails to bring the suspect before the court.

3.4.8 DIFFERENCE BETWEEN HOLDING CHARGE AND ARRAIGNMENT IN NIGERIA

In arraignment, the defendant is charged in a competent court vested with jurisdiction to try the offence for the purpose of taking plea and conducting the trial. While in a holding charge, this element is not present because the suspect is charged in a court that lacks jurisdiction to try the offence and no plea is taken after the charge is read. Criminal trial commences on arraignment. In A holding charge the defendant is remanded in prison custody pending when a charge is filed in a court of competent jurisdiction. The process of remand in such cases is more of an administrative than a judicial proceeding as no determination is made on the merits of the charges. The abuse of holding charge phenomenon by police prosecutors is one of the main factors responsible for the congestion of Nigerian prisons by Awaiting Trial Persons (ATPs). This is because after obtaining a remand order from a magistrate, the suspect is often remanded in custody for an indefinite period of time⁵⁶ pending legal advice of the DPP and trial in the court of appropriate jurisdiction, if the DPP determines that the suspect has a case to answer.

The Supreme Court in *Lufadeju v Johnson*⁵⁷ made a judicial pronouncement on the difference between an arraignment and remand proceedings:

Arraignment involves two things. One, the reading of the charge or information to the accused. Two, the response to the

⁵⁶ Akinseye-George, Y. (2011) *Improving Judicial Protection of Human Rights* op. cit. p. 150.

⁵⁷[2007] All FWLR (Pt. 371) 1532 at 1559, paras. A - C

charge or information by a plea from the accused. The plea can either be guilty or not guilty. It is only when the above procedure is followed that a court of law will be said to have taken the arraignment proceedings. Although remand proceedings is not set out in the Criminal Law, it is known that the charge is not read to the accused and therefore no plea is taken. That makes the difference between remand and arraignment.

It is very clear from the above that the arraignment of a suspect before the Magistrate's Court or any other court involves the presentation of the person or suspect before that court unfettered where the charge or information against him is read over and interpreted or explained to him by the registrar of the court to the satisfaction of the court and the accused person is called upon to plead to the charge. It follows therefore that whereas in a remand proceeding, the suspect may be brought to the Magistrates' Court upon a charge signed by the police officer in charge of the case, he is not required to plead to that charge particularly as the offence with which the person stands charged, being an indictable offence, is clearly outside the jurisdiction of the Magistrates' Court to try, an arraignment or trial under section 215 *supra* cannot be properly so called unless the accused person pleads to the charge containing the offence with which he is charged...⁵⁸

The facts of the case are quite instructive: The respondent and twelve others were brought before the appellant (a Chief Magistrate) by the police on allegations of committing the offence of conspiracy and treasonable felony. The charge was read to the accused persons but no plea was taken. Thereafter, the 1st appellant ordered that the accused person be remanded in custody pending the time they would be arraigned before a High Court since her court does not have the jurisdiction to try the offence. The accused persons were informed of their rights to apply to the High Court for bail. The accused instead of applying for bail at the High Court brought an action against the appellant (the Chief Magistrate in her personal capacity) for an order of *certiorari* to quash the proceedings before the Magistrate Court and aside the remand order. The 1st appellant also claimed the sum of ₦500,000.00 (Five

⁵⁸ Per Onnoghen, JSC, Pp. 1567 – 1568, paras. F - A

Million Naira) as damages. The High Court dismissed the application. The respondent appealed to the Court of Appeal, which allowed and set aside the order of remand, holding that the 1st appellant exceeded her jurisdiction in making the order. Dissatisfied the appellant appealed to the Supreme Court. The Supreme Court in deciding the appeal considered the constitutionality or otherwise of section 236(3) of the Criminal Procedure Law of Lagos State, 1994 and the powers of a Magistrate in remand proceedings. Section 236(3) of the Criminal Procedure Law provides:

If any person arrested for an indictable offence is brought before any Magistrate for remand, such Magistrate shall remand such person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or tribunal for trial. In this section unless the context otherwise requires, 'indictable offence' means any offence –

- (a) Which on conviction may be punished by a term of imprisonment exceeding two years,
- (b) Which on conviction may be punished by imposition of a fine exceeding five hundred naira, or
- (c) Which on conviction may be punished by death by hanging or firing squad.

The Supreme Court set aside the decision of the Court of Appeal and held that the respondents ought to have applied for bail at the High Court instead of instituting another action against the appellant in her personal capacity. The Court further stated that the Magistrate acted within the confines of the law in making the remand order. It held as follows:

The judicial process open to the respondent was to apply to the High Court for and present a good case in support of his request before the High Court. The respondent did not avail himself of the opportunity open to him by the law to apply to a High Court for bail. Rather, he chose to challenge the legality of the entire system which he terms as 'holding charge' or any other name. What was

done in this case was that the man was taken before the Chief Magistrate for the purpose of being remanded in custody pending the time he would be arraigned for his trial.⁵⁹ ... Section 236(3) of the CPL is not unconstitutional and that the lower court was in error when it held that it is. If anything, the said section clearly complements the provision of section 32 of the 1979 Constitution and is designed to aid the administration of criminal justice in this country.

We owe it a duty not to toy with an allegation as grave as treasonable felony neither should we play down the importance of individual liberty and freedom. What section 236(3) of the CPL does is to maintain a balance between the two by doing away with the tendency of arbitrary and near indefinite police detention of suspect without order of court.⁶⁰

The controversy over the legality of the 'holding charge' has now been laid to rest in Lagos State following the passage of the Administration of Criminal Justice Law 2011 which makes elaborate provisions for dealing with remand cases. Sections 264 and 265 of that law are aimed at ensuring that any person arrested and remanded pending arraignment before an appropriate court (i.e. a court that has jurisdiction over the offence alleged) can only be held or remanded for 'probable cause' after a thorough examination by the Magistrate of the surrounding circumstances of each case. Gone are the days when a Magistrate acting upon an application for remand by the police, merely orders the remand of an accused person in custody without a careful consideration of the facts and circumstances of each case. In other words, a request by the police for a remand order pending the arraignment of a suspect can only be granted by a Magistrate if satisfied that there is probable cause to remand such a person. And an order for remand shall not exceed thirty (30) days in the first instance and at the expiration of which the Magistrate shall order the release of the

⁵⁹ Per Akintan, JSC, Pp. 1562 – 1563, paras. E- A

⁶⁰ Per Onnoghen, JSC, P. 1568, paras. F - H

person remanded unless good cause is shown why there should be a further remand order for a period not exceeding one month. Hopefully, these provisions would go a long way in mitigating the harshness of the 'holding charge' in Lagos and other states that have enacted the Administration of Criminal Justice Law.

3.5 COURT-ORDERED PRE-TRIAL DETENTION

Court ordered pre-trial detention is a process whereby a suspect is kept in custody of the prison (or other places) before the trial of the criminal charge against him in a court of law. The person may be remanded by an order of a court in prison custody in order to ensure his availability before the detaining court. Most of the remand orders are made by magistrate courts.

In view of section 35(1) of the 1999 Constitution which guarantees the right to liberty, when any person other than a person accused of capital offence is arrested or detained by a police officer or is brought before a court, he may at any time while he is in custody of such officer or before a charge is preferred against him in court be admitted to bail. Similarly, Article 7(1) (d) of the African Charter further guarantees the right to liberty of a suspect. This is consistent with section 36(5) of the 1999 Constitution which provides that a suspect shall be presumed innocent until the contrary is proved. Unfortunately these provisions are often observed in breach because in most of the prisons in Nigeria, the awaiting trial detainees constitute the majority. The rate of prison congestion in Nigeria is equally traceable to the fact that bail is rarely granted to those facing trial for capital offences, the practice of holding charge, failure of the police to forward the case files to the Ministry, delay in the issuance of legal advice by the Ministry of Justice, non-availability of witnesses, transfer of investigating police officers, transfer or retirement of the trial judges, transfer of prisoners from prison to another prison, harsh or difficult bail conditions, failure to fulfil bail conditions, loss of records, failure of court supervision and other factors.

In *Bayo Johnson v Lufadeju*⁶¹ the Court of Appeal, Lagos Division declared inter alia that the provision of section 236(3) of the Criminal Procedure Law of Lagos State which gives legislative cover to the Magistrate to remand suspects in prison custody to await the charge is unconstitutional. The court cited the English case of *Hartage v Henderick*⁶² on the terrible effect of pre-trial incarceration, and stated as follows:

The imprisonment of an accused prior to the determination of guilt is a rather awesome thing: it cost the tax payers tremendous sums of money; it deprives the affected individual of his most precious freedom and liberty; it deprives him of his ability to support himself and his family, it quite possibly cost him his job, it restricts his ability to participate in his own defence, it subjects him to dehumanization of prison, it separates him from his family and without trial it cast over him aura of criminality and guilt

However, the Supreme Court set aside the decision of the Court Appeal on the ground that a Magistrate court has the power to remand a suspect pursuant to section 236(3) of the Criminal Procedure Law and that the provision is not in conflict with section 35(1)(c) of the Constitution.⁶³ Also in *Shola Abu v COP, Lagos State*⁶⁴ where his Lordship in relation to the validity of section 236(3) of the CPL *vis-a-vis* section 35 of the Constitution on the propriety of detention for the purpose of being brought before a court upon the reasonable suspicion of having committed a criminal offence, held as follows:

To demonstrate that a citizen is detained pending being brought before a court of law upon reasonable suspicion of a criminal offence, those who claimed to have

⁶¹ (2002) 8 NWLR (Pt. 767) 192

⁶² 439 PA 548 at 601 268A2d. @459 (1970)

⁶³ *Lufadeju v Johnson* [2007] All FWLR (Pt. 371) 1532.

⁶⁴ (Unrep.) Judgment of the Ikorodu Division of the Lagos High Court in suit No. IKD/M/18/2003 delivered on the 28th of July, 2004

reasonably suspected him of the offence and apprehended him for that reason must demonstrate the reasonableness of their suspicion by arraigning him before a court of competent jurisdiction, where the reasonableness thereof will be tested within a reasonable time.

It must be noted that pre-trial detention is permitted under certain limited circumstances only. In this respect, the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders established the following principles:

Pretrial detention may be ordered only if there is reasonable ground to believe that the persons concerned have been involved in the commission of the alleged offences and there is endanger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are set free.⁶⁵

The aversion to pre-trial detention is based on a cornerstone of the international human rights regime: the presumption of innocence afforded to persons accused of committing a crime. Pre-trial detention is a practice that violates international norms; waste public resources, undermines the rule of law and endangers public health.⁶⁶Therefore, law enforcement agents are enjoined to employ the use of alternative measures, such as release on bail or personal recognizance. Pre-trial detention should only be used as a means of last resort.⁶⁷

3.6 BAIL

Bail is a basic constitutional right guaranteed under the constitution. ‘Bail is the process by which any person arrested for

⁶⁵ Eight united Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana, August 27th - September, 7 1990.

⁶⁶Mark Shaw, (Spring 2008) Justice Initiative, Open Society Justice Initiative, p. 1

⁶⁷ *Ibid.*

an offence is released from custody either on the undertaking of a surety or on his own recognizance to appear on a future date.’⁶⁸ The right to bail is both statutory and constitutional. It is also rooted in the inherent powers of the court; the right is an embodiment of the rights to personal liberty, fair trial and freedom of movement.⁶⁹ Bail is an interim protection or preservation of the civil liberty of defendant. The relief granted by bail is to serve the purpose of preventing the punishment of the innocent; otherwise the presumption of innocence constitutionally guaranteed to an individual accused of criminal offence would lose its meaning and force. The fact that sections 35 and 36 are entrenched in the Constitution under Chapter 4 makes civil liberties guarantee the most important provision and aspect of the constitution.⁷⁰

Unfortunately in most cases rather than releasing a suspect on bail, he/she is either in police custody or remanded in prison pending the trial. This results in injustice to the suspect particularly in cases in which the suspect is eventually acquitted. In order to ensure the utmost justice, suspect charged with bailable offences should in suitable cases be released on bail.⁷¹

There are three forms of bail: these are police bail, bail pending trial and bail pending appeal.

3.6.1 POLICE BAIL

Police bail includes bail granted by other law enforcement agencies. The law enforcement agents are empowered by the Criminal Procedure Act⁷², the Criminal Procedure Code and other laws to grant bail to any person arrested in connection with any offence pending investigation or arraignment in the court for trial. Police bail is granted upon the suspect entering into a recognizance, with or without sureties to appear at a police station

⁶⁸ *Black's Law Dictionary* 8th Edition, op cit

⁶⁹ Eko E., (2008), *The Law of Bail* (Life Gate Press, Ibadan) p. 1

⁷⁰ *Ibid* at P. 7

⁷¹ *Ibid*, at Page. 21

⁷² See also sections 17 & 18 of the Criminal Procedure Act which provides for bail pending trial and bail pending further investigation respectively.

or court on a future date stated in the recognizance. The recognizance entered at the police station is enforceable in court by virtue of section 18 of the Criminal Procedure Act.

Usually an application for bail is made in writing by the suspect or his surety on his behalf. The suspect may be admitted to bail with or without conditions.

When an individual on police bail is charged to court, upon arraignment the police bail ceases. The defendant therefore must apply to the court for bail; otherwise he will be remanded in custody, unless the court *suo motu* grants the defendant bail pending the determination of the case.

3.6.2. BAIL PENDING TRIAL

The Criminal Procedure Act and The Criminal Procedure Code⁷³ empower the court to admit a defendant to bail pending the determination of the case. The courts have a discretionary power to grant bail. This power of the court to grant or refuse bail depends on the type of court and the nature of the offence. For instance a Magistrate Court cannot grant bail to a person charged with the commission of capital offence. However, under section 118(1) of the Criminal Procedure Act and 341 (3) Criminal Procedure Code a person charged with capital may be granted bail by a High Court. In *Uwazurike & 6 Ors v Attorney General of the Federation*⁷⁴ the appellants were charged with capital offences in the Federal High Court, Abuja. The proof of evidence of the alleged offence against the appellant was not attached to the charge. The court denied the appellant's application for bail. The proof of evidence was subsequently filed. On appeal by the appellant the Court of Appeal, per Bada, JCA allowing the appeal held thus:

Irrespective of the nature or gravity of the offence with which a person is charged, the onus is on the prosecution to show criminal culpability of the accused which will

⁷³ Sections 118 of the Criminal Procedure Act and 340 and 341 of the Criminal Procedure Code

⁷⁴ (2009) All FWLR (Pt 489) 549

serve as a pointer to the fact that a person should not be released on bail. On the other hand, the accused has a duty to show that he is not criminally liable in order not to jeopardize his chances of bail. The courts have an unfettered discretion to grant bail and the discretion must be exercised judicially as well as judiciously. In other words, the discretion must be based on facts and not *in vacuo*.

The appellants were thus granted bail in the sum of five Million Naira (5 Million) with two sureties in like sum. In that case⁷¹, the court restated the conditions that govern the exercise of its unfettered discretion to grant bail as follows:

The courts have over the years in numerous decided cases established the criteria or guidelines that should be taken into consideration in an application for bail. In *Bamaiyi v State* (2001) FWLR (Pt. 46) 956, the following factors were taken into consideration in deciding an application for bail:

- a. The evidence available against the accused person,
- b. Availability of the accused to stand trial;
- c. The nature and gravity of the offence;
- d. The likelihood of the accused committing another offence while on bail;
- e. The likelihood of the accused interfering with the course of justice;
- f. The criminal antecedent of accused person;
- g. The likelihood of further charge being brought against the accused;
- h. The probability of guilt;
- i. The detention for the protection of the accused;
- j. The necessity to procure medical or social report pending final disposal of the case.

It should be noted that the factors listed above are not exhaustive in guiding any trial court in granting or refusing bail pending trial. Also, it is not necessary that all or any of these factors must apply in any case; even one factor may be applied in a particular

⁷¹ *Uwazurike v A.G., Federation, ibid* at 562 paras. A – E.

case to guide the court in granting or refusing bail pending before it.

Where application has been refused by a lower court further application can be made to a higher court⁷⁵. The grant of bail is usually on certain terms or conditions by which a suspect/defendant is admitted to bail. The terms or conditions upon which the police or the courts grant bail are usually determined by the circumstances of particular cases. However, the terms or conditions of bail must not be impossible or onerous to meet. Where the terms and conditions of bail are onerous, the applicant has a right to apply to a higher court for a review of the bail terms. In *Aga Nyamikume v Commissioner of Police*⁷⁶, the two applicants were arraigned before the Senior Magistrate Grade 1, Gboko on a First Information Report for the offence of house breaking, theft, robberies, aiding or harbouring thieves contrary to Section 306 of the Penal Code. The two applicants pleaded not guilty and applied for bail pending their trial. The learned Senior Magistrate in granting the application, made the following order-

...each of the accused is granted bail in the sum of ₦5,000.00 and one surety in the same amount, the surety of whom must be resident in Gboko Township, the surety must be approved in writing by the Chief of Staff Supreme Headquarters himself stamped by him.

Dissatisfied with the conditions or terms of the bail, the applicants approached the High Court and sought a variation of the conditions. The applicants' counsel contended that the bail condition was too harsh and amounted to an indirect refusal of bail. The High Court held that the condition that their sureties should be approved by the Chief of Staff, Supreme Headquarters was too harsh and subsequently mitigated the bail terms.

⁷⁵ See the case of *Uwazurike v A.G., Federation, supra*.

⁷⁶ March 1984, No GBD/5M & 6M/84, Unreported

3.6.3 BAIL PENDING APPEAL

Bail is generally not granted to an applicant who has been convicted and sentenced to a term of imprisonment because the right to presumption of innocence is no longer available to a convicted person. However, the law provides for special or exceptional circumstances whereby an applicant who has been convicted and sentenced but had appealed against such conviction can be granted bail pending the determination of the appeal. Notwithstanding that the court has some discretion to grant or refuse bail the applicant must show exceptional circumstances before such discretion could be exercised in his/her favour. In *Munir v Federal Republic of Nigeria*⁷⁷ the court stated the reasons why it is easier to obtain bail during trial than after conviction:

It is much easier to obtain bail pending trial or during trial than after a conviction. This is so because, trial bail being a constitutional right, the burden is squarely on the prosecution who oppose bail to prove that the facts relied upon by the applicant do not warrant the granting of the application. This is because there is a constitutional presumption in favour of the liberty and innocence of the individual. But in the of post-conviction bail, the position is quite different. The burden this time around is on the applicant because the constitutional presumption of innocence is gone by virtue of the conviction. So also is the presumption in favour of liberty. Every application for bail pending appeal by a convict who is sentenced to a term of imprisonment is therefore considered on its peculiar and special facts and circumstances.

In the above case the appellant/applicant was arraigned before a Lagos State High Court on an eleven-count charge of obtaining money by false pretence by sale of a plot of land, forgery and uttering of receipts as well as land allocation papers, deed of assignment, making and uttering false declaration on oath contrary

⁷⁷ [2009] All FWLR (Pt. 500) 775 at 784 – 785 paras. G -B

to section 1(3) of the Advance Fee Fraud and Other Offence, Act, No. 13 of 1995 as amended and sections 467, 468 and 192 of the Criminal Code, Laws of Lagos State, 2003. He was found guilty, convicted and sentenced to three years imprisonment. He applied to the trial court for bail but was denied bail. The appellant then applied to the Court of Appeal for bail. The appellant's counsel among other things contended that the appellant's notice of appeal raised a substantial question of law and that the applicant would have served a substantial part of his sentence before the appeal will be ripe for hearing. The court held thus:

The question now for consideration and determination in this application is whether the appellant/applicant has discharged the burden placed on him to enable this court exercise the discretionary power vested in it under section 28(1) of the Court of Appeal Act, 2004. The law is well settled, that the Court of Appeal will not grant an application for bail pending an appeal unless there are exceptional and unusual reasons why bail ought to be granted to the applicant. In determining the exceptional or special circumstances, the courts take into consideration the following:

1. If the applicant being a first offender had previously been of good behaviour
2. If the substantial grounds of law are involved in the appeal, it is useful to see if there is any prospect of success on appeal or where a sentence is manifestly contestable as to whether or not it is a sentence known to law, bail should be granted : *Obi v. State* (1992) 8 NWLR (Pt. 257) 76; *Buwai v. State* (2004) All FWLR (Pt. 227) 540, (2004) 16 NWLR (Pt. 899) 285; *Fawehinmi v. State* (1990)1 NWLR (Pt. 127) 486 at 498 – 499 and *R v. Phillip Wise* (1924) 17 CAR 17.
3. Where having regard to the very heavy congestion of appeals pending in the courts, a refusal of bail to the applicant will have the result of the whole or a considerable portion of the sentence imposed on the applicant being served, before the applicants appeal can

be heard: *R. v Tunwashe* (1935) 2 WACA 236; *Okoroji v. State* (1990) 6 NWLR (Pt. 156) ?

4. Where the applicant will be of assistance for the preparation of his appeal and where the appeal is so complex that there is obvious need for close consultation between the applicant and his counsel. In determining the complex nature of appeal, regards must also be had to the nature of the offence, the number of witnesses taken and the quantum of document admitted in the course of trial.
5. Where the application is based on ill health and the applicant cannot get necessary treatment in prison or where the machine used in treating the applicant is not movable, thus cannot be moved to prison, in such circumstance and in order not to put the applicant's health in serious jeopardy, bail will be granted: *Fawehinmi v. State*. However, mere allegation of bad health and no more will not amount to exceptional circumstances.

Before considering the above conditions for admitting a convicted person serving a term of imprisonment to bail pending determination of his appeal, it is necessary or imperative to ensure that the following preliminary conditions have been complied with, namely:

- (a) that the applicant had indeed, in fact lodged an appeal to the Court of Appeal which is pending
- (b) has complied with the conditions of appeal imposed, and these will show the seriousness of his application, and
- (c) if he was granted bail during the trial, that he had not attempted or tried to jump bail.

Paragraphs 7 and 10 of the affidavit in support of the application and paragraph 13(d) of the counter-affidavit of the respondent have clearly established that the above listed preconditions have been satisfied.⁷⁸

The Court putting the above issues into consideration held that it is in evident from the exhibits and averment in the affidavit that the hearing of the appeal is likely to be unduly delayed. Consequently,

⁷⁸ Per Jauro, JCA at p. 780 – 782

if bail is not granted, the applicant may spend a greater proportion, if not all the period of his sentence before his appeal is ripe for hearing. The applicant was granted bail pending the determination of the appeal.

In *Olamolu v The State*⁷⁹ the applicant was convicted and sentenced to two years imprisonment for the offence of stealing without an option of fine by the Lagos State High Court on the 1st of February, 2008. She appealed against her conviction to the Court of Appeal and subsequently brought an application for bail on the ground that she had spent nine (9) months already in the prison and if she is not granted bail, she will serve substantial part of the sentence or all the sentence before her appeal is determined. The court in its ruling held that from the affidavit of the applicant, it is not in doubt she has served eleven (11) months, and by the prison calendar, she may have only seven (7) months to serve. It is also a notorious fact that the court's diary is congested and the possibility of determining the appeal before the expiration of the sentence is not feasible. The court further stated that since there is no apprehension that the applicant will jump bail, she was granted bail pending the determination of the appeal.

3.7 PROSECUTION

Under the Nigerian adversarial judicial system, criminal matters are generally between the state representing the people and the defendant involved. An offence committed against a citizen is deemed to have been committed against the state itself. The state has a duty not only to protect the lives and properties of the citizens; it also has the duty of apprehending and prosecuting offenders before appropriate law courts. The prosecutorial power of the state is usually vested by the state in specific agencies and officers such as the Attorney General, State Counsel, the Police, the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practices Commission (ICPC), National

⁷⁹ (2009) All FWLR (Pt. 485) 1800

Agency for Prohibition of Traffic in Person and other related matters (NAPTIP), NDLEA, CUSTOMS, etc.

Sections 174 and 211 of the Constitution empowers the Attorney-General as the Chief Law Officer of the Federation or State as the case may be to institute, take over or discontinue criminal proceedings against any person in any court of law in Nigeria, except a court martial. The authority of any other law enforcement agency including the police⁸⁰ or private person to institute criminal prosecutions is subject to the overriding constitutional powers of the Attorney- General.

Administratively the constitutional supervisory power of the Attorney-General over criminal proceedings in Nigeria is delegated to the Director of Public Prosecution (DPP) whether at the state or federal level. At the state level of the criminal justice system, the DPP has virtually exclusive responsibility with regard to criminal offences created by the state laws to determine whether a particular offender would be prosecuted or not. In respect of serious felonies such as murder, armed robbery or large scale fraud, the DPP has the responsibility to prosecute such cases directly either by himself or through officers in his department. In discharging this responsibility, the most important raw material relied upon by the DPP is the police investigation case file, a duplicate copy of which is forwarded to the DPP through well-established administrative channels with a covering letter from the police requesting legal advice. This is to enable the DPP study the facts of any particular case and issue the requested legal advice as to whether the case is to be tried or not. Such a file might include: the investigation report; statement of the victims, witnesses and suspect; examination reports of experts such as pathologists, ballisticians, forensic scientist, etc; result of search carried out in the premises of the suspect or other places deemed relevant to the case and indeed all relevant facts that would assist the DPP in making an informed decision as to whether a prima facie case is

⁸⁰ See section 23 of the Police Act.

made out against the suspect such as to warrant his being charged to court. The DPP's decision in this critical area of the administration of justice is final except overruled by the Attorney-General.⁸¹ A decision to 'prosecute ought to be primarily geared towards the public benefit in terms of protecting public norms and societal cohesion by underling the principle of accountability as a deterrent to others who might be inclined to break the law'⁸² and for the maintenance of law and order in the society. Where the DPP is of the opinion that there is a prima facie case against a suspect, he oversees the filing of the necessary indictments against the suspect in the High Court and handles the actual prosecution of the case either by himself or through officers in his department.

The police is one of the agencies authorized to institute criminal proceedings against an alleged offender in accordance with their duty of due enforcement of all laws and regulations.⁸³ The authority of the police to prosecute in criminal proceedings is derived from section 23 of the Police Act which provides that subject to the powers of the Attorney-General to takeover and continues or discontinues any criminal proceeding any police officer may conduct in person all prosecutions before any court. In practice the police (whether qualified as a legal practitioner or not) may prosecute criminal proceedings in the Magistrate Courts and other lower criminal courts. In the High Courts and other superior courts of records, the police prosecutor is expected to be a legal practitioner, and when he is so qualified, nothing precludes him from prosecuting a criminal case in the High Court or other superior court of records without a fiat from the Attorney-General: *Olusemo v Commissioner*.⁸⁴ Here, the appellant and five others were brought before a Magistrate Court in Abuja on First Information Report on allegations of conspiracy, forgery and

⁸¹ Arthur-Worrey, F., (2000), *The Prosecutor in Public Prosecutions* (Lagos, Josadeen Nigeria Ltd) pp. 19 and 32

⁸² *Ibid* at p. 32

⁸³ Momodu, B. (2007), *Law and Practice of Criminal investigation and Prosecution in Nigeria*, Ibadan, Stirling Horden Publishers (Nig.) Ltd p. 156

⁸⁴ (1998) 11 NWLR (Pt. 575) 547

attempted theft among other offences contrary to the Penal Code Act. They were later arraigned for the offences. Counsel for the appellant applied at the Magistrate's Court for the proof of evidence as well as the prosecution witnesses. His application was refused by the court on the ground that it was too early. The appellant being aggrieved appealed to the High Court of the Federal Capital Territory. At the High Court the appellant also objected to the appearance of the prosecution counsel-Mr S.G. Ehindero, a lawyer and a Commissioner of Police who represented the prosecution on the ground that police officers cannot prosecute in the High Court. The High Court ruled that the Police officer was competent to appear and prosecute in the High Court.

The appellant further appealed to the Court of Appeal. The court in deciding the appeal, considered the provisions of section 23 of the Police Act, section 98 of the High Court Act of the Federal Capital Territory, Abuja and section 160 (1) of the Constitution of the Federal Republic of Nigeria, 1979 (now section 174 of the 1999 Constitution). Section 98 of the Federal Capital Territory High Court Act provides:

In the case of a prosecution by or on behalf of the state or by a public officer in his official capacity, the state or that official may be represented by a law officer, Director of Public Prosecutions, state counsel, administrative officer, police officer, or by any legal practitioner or other person duly authorized in that behalf by or on behalf of the Attorney-General or, in revenue cases, authorized by the head of the department concerned.

The court held that the police have the power to prosecute in the High Court of the Federal Capital Territory, Abuja. Kalgo, JCA held inter alia:

In the instant case, the power to prosecute or undertake criminal prosecutions is vested on the police officer under section 23 of the Police Act subject to the exercise

of the powers conferred on the Attorney-General by the provisions of section 160 of the Constitution. It is very clear and without any doubt, that the Attorney-General has not exercised his power under section 160 of the Constitution in the instant case. Therefore, the police officer's powers to prosecute in the criminal proceedings in this case are not limited, restricted or controlled. Mr Ehindero qua police officer is competent to prosecute in these proceedings in any court in Nigeria including the High Court⁸⁵

Similarly, the Supreme Court in *Federal Republic of Nigeria v Osahon & 7 Ors*⁸⁶ made a far reaching decision to the effect that a police officer (whether he is qualified to practice as legal practitioner or not) has competence to prosecute criminal cases in any court in Nigeria. In the instant case, the respondents were arraigned before the Federal High Court in Lagos on a six-count charge of various offences under the Miscellaneous Offences Decree (Act) of 1984. The prosecutors were Nuhu Ribadu and other police officers. The respondents challenged the competence of the prosecutors on the ground that they were not officers in the office of the Attorney-General. The trial court dismissed the application and held that the police officers were competent to prosecute in any court. On appeal, the Court of Appeal allowed the appeal and held that the decision in *Olusemo v Commissioner of Police*⁸⁷ cannot apply because section 156 of the Federal High Court Act, 1990 did not mention police officers (as section 98(1), High Court Act, Abuja) as persons empowered to represent the state in criminal proceedings at the Federal High Court. The court quashed the charges against the appellant.

The prosecutor appealed the decision to the Supreme Court. The sole issue for determination before the court was whether the Court

⁸⁵ Kalgo, JCA, pages 558, Paras F - H

⁸⁶ [2006] 5 NWLR (Pt.973) 361

⁸⁷ *supra*.

of Appeal was right when in interpreting section 56 (1) of the Federal High Court Act, section 23 of the Police Act and section 174 (1) of the 1999 Constitution, it came to the conclusion that the police officers prosecuting the respondents lacked the competence to initiate or conduct criminal proceedings before the Federal High Court.

The Supreme Court in consideration of all these laws by a majority of 5 to 2 Justices (Katsina-Alu and Musdapher, JJSC dissenting) held that the police are competent to prosecute not only in the Federal High Court but in any court in Nigeria. The court held *inter alia*:

The provision of section 56 of the Federal High Court Act has not closed the category of those who could prosecute criminal cases in the Federal High Court. If it purports to do so, it will conflict with section 174 (1) of the Constitution. The Police Act in section 23 is made subject to sections 174 (1) and 211 (1) of the Constitution. The constitution cannot be trivialized or be *terrorem* of any law. The use of the phrase “subject to” used in section 23 of the Police Act is a very clear manifestation of the provisions of the Constitution vis-à-vis any other law. In the face of the provisions of the constitution, the Acts or laws of the country brood no ground for classification into specific or general provisions to defeat the constitution.⁸⁸

The above cases have cleared the controversy on the powers of the police to prosecute at the high court. In quantitative terms, the police handle by far the higher number of the cases when compared with the DPP’s office. Yet most of the police prosecutors are not legal practitioners. They rely on the limited training provided by the various police colleges and their experience in investigation and prosecution of cases. This explains the inefficiency of most police prosecutors leading to delay as they

⁸⁸ Belgore, JSC, at pages 406-407 paras. E - G

are usually no match for the lawyers to the defendants in court. Also, there is this common perception of the citizenry about police officers, that they are too prone to yield to corrupt influence either to frustrate the due prosecution of a case or to file charges in court purely as a means of victimization or blackmail.⁸⁹

Currently in Lagos State and some other states in the Federation, the police no longer have the power to prosecute cases against any person alleged to have committed murder or arm robbery or in respect of any criminal proceedings in which the Magistrate Court has no jurisdiction. This is because under the Robbery and Firearms Act only the Attorney-General can file criminal charges in respect of offences created by that Act and in murder cases, it is only the Attorney-General that can file an information in the High Court.

Private persons can also institute criminal proceeding but first of all the private person must apply for and obtain the *fiat* of the Attorney-General before commencing any private prosecution of a defendant in a court. In *Commissioner of Police v Tobin*⁹⁰ the respondent was arraigned before the Chief Magistrate's Court of Bony in Rivers State on a five-count charge of conspiracy to commit felony, house breaking, theft and unlawful destruction of a dwelling house contrary to provisions of the Criminal Code. The private prosecutor did not exhibit the fiat by the Attorney-General. At the conclusion of the prosecution's case, the respondent's counsel made a no-case submission.

Ruling in favour of the respondent, the court held that the prosecution had not made any *prima facie* case against him. The respondent was thus discharged and acquitted. The appellant being out of time to appeal, filed an application before the High Court for leave to appeal against the ruling of the Chief Magistrate's court. The application was refused on the grounds *inter alia* that the

⁸⁹ See Arthur-Worrey, F. *Op. Cit.*, P. 26

⁹⁰ [2009] All FWLR (Pt. 483) 1302

applicant lacked the *locus standi* to bring it. The appellant's further appeal to the Court of Appeal was dismissed. The court reasoned, Per Saulawa JCA, thus:

“it is indeed the law that under the Nigerian adversarial judicial system, any private prosecutor must first and foremost apply for and obtain the authority or fiat of the Attorney-General prior to the commencement of a private prosecution. In the instant case, by virtue of the provision of section 75(i) and (iii) of the Magistrates Court Law, Cap. 84 Laws of Rivers State, 1999, the prosecution (Appellant's) counsel has a duty of establishing that he had sought and obtained the necessary fiat of the Attorney-General of Rivers State prior to the instituting of the five count charge against the respondent ...

Ironically, however, contrary to the above assertion by the learned counsel, there is no evidence on the face of the record of the proceedings of the trial chief Magistrate court... In short, the availability of the alleged fiat prior to and at the commencement of the trial of the respondent by the trial Chief Magistrates Court is , to say the least, very questionable. I am therefore not surprised by the finding of the court below...”

Usually when a private prosecutor wants to prosecute he must first get a certificate of endorsement from a law officer that he has seen the information and he declined to prosecute at the public expense. Secondly, the private prosecutor must enter into a recognizance in the sum of N100 with one surety in like sum or deposit the sum of N100 to prosecute the information. If a law officer refuses an application for endorsement, an order of mandamus can be brought by the private prosecutor to compel the law officer to perform his statutory duty. This is in accordance with section 342 of the Criminal Procedure Act. In *Fawehinmi v Akilu & Anor*⁹¹ the appellant applied to the Director of Public Prosecutions (DPP) of Lagos State for endorsement of his private information to

⁹¹ (1987) 11 – 12 SCNJ 151

prosecute the respondent for the murder of Dele Giwa. The DPP refused to endorse it. The appellant applied to the High Court for leave to apply for an order of mandamus to compel the DPP to endorse his information. The trial court dismissed the application on the ground that the DPP had not reached a decision whether or not to prosecute. The appellant's appeal to the Court of Appeal was also dismissed. On further appeal to the Supreme Court, the court held that the appellant, as a citizen of Nigeria, has *locus standi* to initiate criminal proceedings against a person suspected of having committed an offence. The court therefore granted leave to the appellant to apply for an order of mandamus.

However, section 342 of the CPA has been amended in some Southern States to limit its application to a specified offence. For example, in Lagos State, a private information is only limited to the offence of perjury. In prosecuting a criminal case the burden is always on the prosecution to prove beyond reasonable doubt all the ingredients of the offence with which the defendant is charged. This is by virtue section 135 (1) and (2) of the Evidence Act. In section 36(5) of the 1999 Constitution everyone who is charged with an offence shall be presumed to be innocent until proven guilty. Any doubt is resolved in favour of the defendant.

3.8 IMPRISONMENT

When a defendant is found guilty of the offence charged, he is convicted and sentenced appropriately. The sentencing may be in form of imprisonment, canning, binding over or execution. Only imprisonment shall be considered presently. A defendant upon conviction may be imprisoned as a punishment for the offence. Imprisonment may be either with or without hard labour as the court may order. The term of imprisonment imposed by the court must not exceed the maximum punishment prescribed for the offence by the law or the maximum which the court has jurisdiction to impose. Furthermore, a court has discretion to impose a sentence of imprisonment less than the maximum prescribed for a particular offence except with regard to capital punishment where the minimum punishment stipulated by the law

is death penalty or where the law specifically prescribes a mandatory term.⁹²

After sentencing, the court sends the convict to the prison where he or she will serve the sentence or jail term. It cannot be overemphasized that detainees or prisoners do not cease to be human beings, no matter how serious the crime for which they have been accused or convicted. The court of law only orders that they should be deprived of their liberty, not that they should forfeit their humanity.⁹³

In Nigerian prisons, majority of the inmates have not yet been convicted. In fact, more than half of the prison population is made up of pre-trial detainees (or those awaiting trial), whose cases are either under investigation, under trial or on remand on holding charge. These people are presumed innocent. They are unlike convicted prisoners who are imprisoned as a punishment. Therefore, prison administration must ensure that their unconvinced status is reflected in their treatment and management. Most importantly pre-trial detainees must be allowed to seek legal advice or legal aid. Article 10 of the International Covenant on Civil and Political Rights stipulates that all persons deprived of their liberty shall be treated humanely and with respect for their inherent dignity as human beings.

It is noted also that prison work is demanding. It involves working with men and women who have been deprived of their liberty, many of whom are likely to be mentally disturbed, suffer from addictions or have poor social and educational skill and come from marginalized groups in society. Some will be a threat to the public; some will be dangerous and aggressive; others will try very hard to escape. None of them wants to be in prison. Each of them is an individual person. Therefore the role of staff of the prisons is to:

⁹² Osamor, B., op. cit. p. 389 and Doherty, O., op. cit. p. 320.

⁹³ Coyle, A. (2002), *A Human Right Approach to Prison Management*. (London, International Centre for Prison Studies) p. 31.

- i. Treat prisoners in a manner which is decent, humane and just;
- ii. Ensure that all prisoners are safe;
- iii. To make sure that dangerous prisoners do not escape;
- iv. To make sure that there is good order and control in prisons;
- v. To provide prisoners with the opportunity to use their time in prison positively so that they will be able to resettle into society when they are released.

In order to ensure that these values are properly understood and implemented by staff, it is important that a prison administration sets out its statement of purpose clearly. Such a statement will be based on international instrument and standards and will be clearly communicated to all who are involved in the work of prison.⁹⁴ The international human rights instruments do not leave room for any doubt or uncertainty in respect of the illegality of torture and ill-treatment. They state clearly that there are absolutely no circumstances in which torture or other cruel, inhuman or degrading treatment or punishment can ever be justified.

3.9 DISCHARGE OR ACQUITTAL

Not all criminal prosecutions result in conviction. Some end in a discharge in which case the defendant is freed or let off on some technical grounds such as failure on the part of the prosecution to call a particular witness or tender a necessary document. The defendant may always be brought back for trial whenever the state is ready with the necessary materials for establishing the guilt of the defendant. A trial may also result in a discharge and acquittal in which case, the defendant is freed or let off on merit, that is to say, after the court has examined all material evidence supplied by the prosecution and concludes that the defendant is not guilty. The effect of an acquittal is that the person acquitted is totally free and can never be tried again for the same offence in respect of which the court has acquitted him.

⁹⁴ Ibid at pp 31, 34, 13

3.10 STAGES OF CRIMINAL PROCESS FOR OFFENCES WITH CAPITAL PUNISHMENT

In practice the various stages involved in the criminal justice system for offences with capital punishment from the time of arrest of a suspect to the time of prosecution resulting in either conviction or discharge/acquittal are:

1. Arrest (after or before investigation);
2. Detention of the suspect in the police station or other agencies' cell (whether investigation has been carried on or not and whether investigation is going on or not);
3. The accused is charged (mostly in the Magistrate Court);
4. For offences attracting capital punishment there is no arraignment (no plea is taken) as the Magistrate Court lacks jurisdiction generally. The charge is usually read but the defendant takes no plea;
5. The Magistrate Court declines jurisdiction but orders the detention of the defendant in prison custody; orders the Police to transfer the case file to the office of the DPP and report compliance at the next adjourned date, and then signs the remand warrant (usually two copies, one for the court and the other for the prisons);
6. The Magistrate adjourns the case for report;
7. The Court duty police and/or the bailiff take the defendant with the remand warrant to the prison;
8. The prison authorities receive the detainee with the warrant;
9. The detainee is locked up in prison;
10. The prison authorities file the warrant and update their records/notice/data base;
11. The warrant is updated with each court appearance;
12. The file is transferred from the Police to the office of the DPP for advice. (Here copies of the case file are made and letters written between the two offices involved). This is one stage that creates so much challenge on access to justice. The police are sometimes unwilling or to transfer the file. In some cases the unwillingness stems from corrupt practices when they require the defendant to pay money for the services. Other reasons why the

case file may never be transferred or delayed before it is transferred are: inconclusive investigation, tardiness on the path of the police, transfer of police personnel, manpower challenge etc;

13. The DPP acknowledges the receipt of the case file, and the Investigating Police Officer brings a copy of the letter of transfer to court. The court receives it as an exhibit and adjourns the case *sine die*;

14. The DPP prepares a written opinion advising that the defendant should be prosecuted or not prosecuted. Where the DPP advises that there should be a prosecution, he/she files a charge/complaint/information as the case may be under the Rules in the appropriate court and the defendant is tried there. If the opinion is that the defendant should not be prosecuted, the DPP writes the Magistrates requesting that the defendant should be discharged. The Magistrate makes the order of discharge release from prison custody. The stage when the DPP or the State Counsel in charge receives the case file creates another challenge. In many cases, this opinion may never be written or it may take a long time to be written. Some reasons for this attitude on the part of the Ministry of Justice, the DPP and State Counsel includes: staff ineptitude, unwillingness to work, tardiness, corruption, manpower challenge etc.

3.11 CONCLUSION

The various procedures for commencing criminal proceedings in Nigerian courts have been outlined in this chapter. There is obviously a need to harmonize and made them uniform across the country. The experience of a uniform mode of instituting criminal proceedings in the Federal High Court shows that uniformity is desirable in this respect. The proposed Administration of Criminal Justice Bill has rightly opted for a uniform mode of commencement of criminal proceedings across the country. When passed it will move the criminal procedure system in the country forward and obviate many of the bottlenecks presently inhibiting the system.

CHAPTER 4

An overview of the Human Rights of Prisoners/Pre-trial Detainees in Nigeria

OUTCOMES

Explain and discuss the following:

- (i) The human rights of prisoners/pre-trial detainees in Nigeria;
- (ii) The sources of the rights of prisoners/pre-trial detainees;
- (iii) The extent to which the rights of prisoners/ detainees are respected in the Nigerian prison system.

4.1 MEANING OF HUMAN RIGHTS

Several attempts have been made to define Human Rights and no one meaning or definition would seem to suffice for all places, times and purposes. For our present purpose, the definition proffered by Gewirth¹ is apt. In his words:

¹ Gerwith, A (1984), *The Epistemology of Human Rights* in Lloyds, *Introduction to Jurisprudence*, Stevens, 5th Ed, p. 229. The strength of Gerwith's argument seems to be that human rights are rooted in the belief by a human being that he has rights to freedom and well-being which others cannot interfere with and that he cannot deny these rights to other human beings. In other words, it is illogical to deny other human beings rights which I claim for myself. Lloyd says the force of Gerwith's logic is difficult to counter. For we must surely accept that when we wish to deny someone a right in the name of greater social goal or higher moral ideal that we must justify our actions to him or her. But how would such a person understand our reasoning if we deny him or her those interests s/he requires to be able to appreciate the force of our arguments (at the very least freedom of thought and expression?: *Introduction to Jurisprudence* (Freeman, M.D.A, 8th edition (London, Sweet and Maxwell) pp. 611-612.

Human rights are primarily claim-rights in that they entail correlative duties of other persons or groups to act or to refrain from acting in ways required for the right-holders having that to which they have rights.

Similarly, although with a slight variation, Osita Eze views human rights as:

demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *ex lata* while others remain aspirations to be attained in the future.²

Both Gerwith and Eze are agreed that human rights are claims or demands which are protected by moral beliefs and by the legal system. These rights are designed to enhance the personality and status of all human beings everywhere including those under incarceration for one reason or the other. Human Rights thus evoke suggestions of being anchored on a belief in human dignity and the inherent equality of all persons.³

4.2 THE NATURE AND SCOPE OF HUMAN RIGHTS

Human Rights are the basic entitlements of all human beings in any society. They pertain to humans by virtue of their humanity. They are the irreducible minimum requirement for a civilised human existence in any society. An eminent jurist, Justice Kayode Eso has put it thus, "This is no doubt a right guaranteed to everyone including the appellants by the Constitution. But what is the nature of a Fundamental Right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the

² Eze, O. (1984), *Human Rights in Africa: Some Selected Problems*, Lagos, (Macmillan Publishers) p. 5.

³ Pagels, E. (1979), "The Roots and Origins of Human Rights" in Henkin (Ed.), *Human Dignity- The Internalization of Human Rights* (1979) Aspen Institute for Humanistic Studies, N.Y. 1/7.

political society itself. It is a primary condition to a civilised existence⁴

Another eminent authority, Professor M.A. Ajomo has stated that, -Simply put, human rights are rights inherent in man; they arise from the very nature of man as a social animal. They are those rights which all human beings enjoy by virtue of their humanity, whether black, white, yellow, Malay or red, the deprivation of which would constitute a great affront to one's natural sense of justice.⁵

Human Rights exist irrespectively of whether or not they are recognised by a given society or legal system. Indeed, it is trite that human rights existed prior to any human society or legal system. Thus, any human society or legal system which fails to recognise them is patently unjust and unsustainable.⁶

The idea of the rights of man in the sense of fundamental inalienable rights essential to human beings dates back to antiquity. The manifestation of these rights began in the form of resentments, agitations and eventually rebellions against persons or institutions that deny people of their rights.

The human rights abuses that attended the Second World War brought to the fore, the need for measures that could guarantee better protection of the human rights of mankind in the post-war era. Today, human rights are regarded as inalienable and indisputable rights which every society must recognise as they form the basis for human existence.

⁴ *Ransome Kuti & others v Attorney-General of the Federation* [1985] 5 NWLR (Pt. 10) 211 at 229-230.

⁵ See Ajomo, M.A., (1993) -The Development of Individual Rights in Nigeria's Constitutional History in Ajomo and Owasanoye, (Eds.), *Individual Rights under the 1989 Constitution*, (Nigerian Institute of Advanced Legal Studies) p.1

⁶ See Akinseye-George, Y. (2011) *Improving Judicial Protection of Human Rights in Nigeria*, (Centre for Socio-Legal Studies, Abuja) pp. 1-2

Although in practice, human rights are interdependent, it is common to view them in three categories or classifications, namely:

- (a) Civil and Political Rights (or first generation rights) covering rights such as the right to life, freedom to dignity of the human person, freedom of expression, personal liberty, right to fair hearing, freedom from discrimination, freedom of conscience and religion, freedom of association etc. These rights are covered by the International Covenant on Civil and Political Rights;
- (b) Economic, Social and Cultural Rights (or second generation rights) covering rights to education, a fair and decent standard of living and Medicare, right to work, trade union rights, food, adequate shelter, social security etc. These rights are covered by the International Covenant on Economic, Social and Cultural Rights;
- (c) Solidarity Rights (or third generation rights) which include the right to self-determination, right to development, healthy and balanced environment, peace, right to communicate, to share in the common heritage of mankind, etc.⁷

Whilst the focus in this chapter is on the rights of prisoners/pre-trial detainees, the forgoing affords the context against which those rights are to be examined.

4.3 WHO IS A PRISONER?

According to *Black's Law Dictionary*⁸ a prisoner is a person who has been convicted and is serving time in prison. He is also a person given a prison sentence. Andrew Cole⁹ defines a prisoner as a person held in a place of detention. Andrew Cole's definition is more in tune with the popular albeit erroneous understanding of the term prisoner. The error in that definition is that it fails to

⁷ See Akinseye-George, Y., (2009) *Justice Sector Reform and Human Rights in Nigeria*, (Centre for Socio-Legal Studies, Abuja) p. 89

⁸ Garner, B. A. (ed), (2004), *Black's Law Dictionary*, 8th Edition, op cit, p.1232

⁹ Cole, A. (2002), *A Human Rights Approach to Prison Management op cit* p. 12

differentiate between persons held in a place of detention and persons who have been convicted and therefore legally kept in a place of detention. Although pre-trial detainees are kept in a place of detention, it is not legally correct to call them prisoners.

The Prisons Act therefore rightly defines a prisoner as any person lawfully committed to custody.¹⁰ It cannot be overemphasised that persons who are imprisoned do not cease to be human beings no matter how serious the crime for which they have been accused or convicted. While the court of law or judicial authority may have ordered that they should be deprived of their liberty, that order does not tantamount to a deprivation of their humanity. This brings to the fore the issue of the rights of prisoners.

4.4 WHO IS A PRE-TRIAL DETAINEE?

A pre-trial detainee is a defendant who is held before trial on criminal charges either because the established bail could not be posted or because the release was denied.¹¹ Detainees held in pre-trial detention retain the status of not convicted people. In many countries including Nigeria, pre-trial detainees constitute the majority of those in prison as a result of long delays in the trial of their cases and inadequate finance to pursue their cases or to hire a lawyer or other bottlenecks in the criminal justice system. Pre-trial detention can sometimes last for years with some detainees serving longer pre-trial detention period than the maximum sentence they could possibly have been given for the offences with which they are charged. How long people are held in pre-trial detention depends on a number of factors:

- (a) The speed of the police or prosecutor's investigation;
- (b) The sincerity of the police to proceed with the presentation of investigation reports;

¹⁰ Cap P29, Laws of the Federation of Nigeria 2004

¹¹ Bryan A. Garner (Ed), *Black's Law Dictionary, Op. Cit.*, p.480

- (c) Speed of the DPP to produce a charge or legal opinion on the culpability or otherwise of the defendant;
- (d) The sincerity of the DPP and his/her staff to play their part in the process of the charge and trial;
- (e) The capacity of the system to transport defendants from prison to court for trial;
- (f) The workload in the courts and the resources available to conduct trials;
- (g) The availability of legal advice and public defenders for pre-trial detainees;
- (h) In certain circumstances, a concern of the defendant to postpone the trial for as long as possible.

Reducing the number of pre-trial detainees, improving the conditions in which they are held and ensuring their access to legal advice and opportunities to prepare for their trial are priorities when improving the human rights compliance of a penal system.¹²

4.5 ENTITLEMENT OF PRISONERS/PRE-TRIAL DETAINEES TO HUMAN RIGHTS

Prisoners as well as Pre-trial detainees are entitled to human rights protection. People who are detained or imprisoned do not cease to be human beings no matter how serious the crime of which they have been accused or convicted. Persons who are detained or imprisoned retain all their rights as human beings with the exception of those that have been lost as a specific consequence of deprivation of liberty. The Court of Appeal in *Peter Nemi v Attorney General of Lagos State & Ors*^{12A} has rightly held that prisoners still have their rights intact, except those rights deprived by law in virtue of the imprisonment. Such rights which have been lost or restricted by reason of conviction include the following:

¹² King's College London (2004) *A Report by the International Centre for Prison Studies, Guidance Note 5*, p.2

^{12A} [1996] 6 NWLR (Part 452) 42, see particularly Uwaifo, JCA(as he then was).

- (a) The right of freedom of movement is obviously restricted by the nature of imprisonment as is that of free association. However, these rights are not completely removed since prisoners are rarely held in total isolation and, when they are, there has to be a specific and cogent legal justification.
- (b) The right to family contact is not taken away but its exercise may be well restricted. A father for example does not have unrestricted access to his children or them to him in a prison setting.
- (c) The right of everyone to take part in the government of his or her country directly or through freely chosen representatives may also be restricted by imprisonment. Article 25 of the International Covenant on Civil and Political Rights indicates that this right is to be exercised by voting in elections. In some jurisdictions, prisoners who have not been convicted are eligible to vote; in others all prisoners may vote. In other countries, no one who is in detention is allowed to vote in elections and the prohibition of voting may even extend to those who have served their sentence and left prison.¹³

In effect, every stakeholder in the Criminal Justice System should never lose sight of the fact that prisoners are human beings. They must continually resist the temptation to regard the prisoner merely as a number rather than as a whole person. Prison staff have no right to inflict additional punishments on prisoners by treating them as lesser beings who have forfeited their right to be respected because of what they have done or accused of having done. Ill-treatment of prisoners is always legally and morally wrong. In addition, such behaviour lessens the very humanity of the member of staff who acts in such a way. Governments, Prison authorities and staff need to have a clear understanding of the implications of these principles. Some principles are very clear, there is for example a total prohibition on torture and deliberately inflicted cruel, inhuman or degrading treatment. There has to be an

¹³ Cole, A., *op. Cit*, p.32

understanding that this prohibition does not merely apply to direct physical or mental abuse. It also applies to the totality of the conditions in which prisoners are held.¹⁴

4.6 AN EXAMINATION OF THE HUMAN RIGHTS OF PRISONERS/PRE-TRIAL DETAINEES UNDER THE CONSTITUTION

(1) The Right to Life

Section 33(1) of the Constitution provides thus:

Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

Sub-section (2) provides that a person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force and is reasonably necessary-

- (a) For the defence of any person from unlawful violence or for the defence of property;
- (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) For the purpose of suppressing a riot, insurrection or mutiny.

The Right to life is the most important of the rights guaranteed by our Constitution. This right is recognised in most jurisdictions as the most fundamental of all rights. It imposes on an individual the obligation not to deprive another intentionally of his life except in the event of self-defence, suppressing a riot or mutiny or to prevent

¹⁴ *ibid*, p.31

a lawful arrest. It also imposes on the State to refrain from the intentional and unlawful taking of life save in exceptional circumstances permissible by the Constitution in Section 33(2). The State is also obligated by the provision to investigate deaths caused by the actions or omissions of state agents or deaths for which the state might be responsible. In the case of *Joshua v. The State*,¹⁵ the Court of Appeal denounced the killing by the police of two suspects who were under police custody before they were charged in court. This extra-judicial killing of the duo led the court to pronounce strongly against such actions exhibited by law enforcement agents who take the law into their hands.¹⁶

As an extension of the above principle, the state is under a positive obligation to protect the lives of persons held in prison or police custody. It has been established in various judicial decisions that where an individual is taken into police custody in good health but is later found to be dead, it is incumbent on the state to provide a plausible explanation of the events leading to his death failing which the authorities must be held responsible.¹⁷ Thus the right of the defendant or convicted offender to life is therefore the basis of the duty of care which the law imposes on prison authorities. The position of the law in Nigeria regarding the entitlement of prisoners to the right to life, with particular reference to condemned prisoners is substantially in accord with the provisions of the United Nations Safeguard Guaranteeing Protection of the rights of those facing death penalty providing that capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial.¹⁸

¹⁵ (2009) 6-7 NMLR 78 at 79

¹⁶ See also the case of *Maiyaki v The State* (2008) 15 NWLR 173 at 220.

¹⁷ See the foreign case of *Velikova v Bulgaria* (18 May 2000, Unreported), ECtHR, at para 70.

¹⁸ See Udombana, N. (2010) "An Examination of the Rights of Prisoners and Detainees in Nigeria" *Nigerian Bar Journal* Vol. 6 No. 1 July 2010 p.1 at 9.

In the case of *Aliu Bello v Attorney-General of Oyo State*,¹⁹ a convict was executed while his appeal was still pending in the Court of Appeal. The Supreme Court per Oputa JSC reprimanded the state thus:

The premature killing of Nasiru Bello in the surrounding circumstances of this case was both unlawful and illegal, it was also wrongful in the sense that it was injurious to the right primarily of Bello to life and secondarily of his dependents who by his death lost their bread-winner; it was needless in the sense that he (Nasiru Bello) was not allowed a just determination of his appeal by the Federal Court of Appeal; it was reckless in the sense that it was done in complete disregard to all the constitutional rights of the deceased, Nasiru Bello.

The main principle emanating from this decision is that the capital punishment shall not be carried out pending any appeal or other recourse procedure or proceedings relating to review, pardon or commutation of the sentence. In other words, every legally available avenue for reprieve must be fully exhausted before a prisoner's right to life can be terminated.²⁰

(2) The Right to Dignity of Person

Section 34 (1) of the 1999 Constitution provides that every individual is entitled to respect for the dignity of his person, and accordingly-

- (a) No person shall be subject to torture or to inhuman or degrading treatment;
- (b) No person shall be held in slavery or servitude; and
- (c) No person shall be required to perform forced or compulsory labour.

¹⁹ (1986) 12 SC 1

²⁰ See Akinseye-George, Y., *Improving Judicial Protection of Human Rights in Nigeria*, *op. cit.*, and pp.94-97.

Sub-section (2) specifies what cannot be defined as forced labour under Section 34 (1) (c) of the 1999 Constitution.

The above section is aimed at protecting the dignity of the human person. To this end, three major threats to human dignity are itemised by the subsection as:

- (a) Torture or inhuman or degrading treatment;
- (b) Slavery or servitude; and
- (c) Forced or compulsory labour.

Many prisoners and pre-trial detainees normally face torture or inhuman treatment while in prison. In *Uzoukwu v Ezeonu*,²¹ the Court of Appeal, per Niki Tobi, JCA (as he then was) defined the word "torture" as putting a person through some form of pain which could be extreme. It also means to put a person in some form of anguish or excessive pain. The torture under the subsection could be a physical brutalisation of the human person. It could also be a mental torture in the sense of mental agony or mental worry. It covers a situation where a person's mental orientation is very much disturbed that he cannot think and do things rationally, as the rational human being he is.

An inhuman treatment on the other hand is a barbarous, uncouth and cruel treatment; a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty. The provision of Section 34 imposes an obligation on the state to safeguard the human rights of persons in detention/prison including those who are detained in respect of criminal offences. Such persons are not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. The condition of Nigerian prisons and police cells is such that persons who are detained there undergo terrible physical and mental torture which often deprive them temporarily or permanently, of the use of their sight or hearing. Many even die there. Some prison officials often subject inmates to various degrees of torture including gruesome beating.

²¹ [1991] 6 NWLR (Pt. 200) 708

Furthermore, some prisoners are reported to be subjected to chaining and forced to sleep on a wet blanket or put in congested prisons.²² These practices no doubt violate the dignity of the victims.

Finally, though death penalty remains legally recognised in Nigeria, the practice of keeping prisoners on death row for a prolonged period of time before execution amounts to inhuman and degrading treatment. These categories of prisoners undergo the ordeal of 'Awaiting Execution' or waiting for the hangman. Having been condemned to death, they are kept on death row for many years without their death sentence being carried out. In such a situation, they suffer excruciating and sustained psychological trauma. Some have waited for as long as 20 years and they have been deprived of both life and death. In the case of *Peter Nemi v Attorney General of Lagos State*²³, the appellant had been on death row for eight years. He argued that his fundamental human rights of freedom from inhuman and degrading treatment had been breached. The prosecution counsel asserted that as a condemned prisoner, he had no fundamental human rights after conviction and sentence. In rejecting this argument, Justice Uwaifo queried:

Does it mean that a condemned prisoner can be lawfully starved to death by the prison authorities?

Can he be lawfully punished by slow and systematic elimination of his limbs one after another, until he is dead? Would any of this amount to inhuman treatment or torture? Is a condemned prisoner not a person or an individual?

For to end the life of a condemned person, it must be done according to the due process of law and it is said that the due process of law does not end with the pronouncement of sentence.

²² See Udombana, N., *op. cit.*, p.14

²³ SC. 303/1990

In *Odafe and Ors v Attorney General and Ors*^{24A}, the Federal High Court, Port Harcourt, held that failure by the prison officials to give the applicants/prison inmates as confirmed HIV/AIDS patients due medical attention and access to medical services while in prison custody violated the rights to human dignity and health under articles 5 and 16 of the African Charter.

(3) The Right to Freedom of Thought, Conscience and Religion

Section 38 (1) of the 1999 Constitution provides thus:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

This provision of the Constitution is very important in a multi-religious country like Nigeria. The various religions practiced must be given equal opportunity. Thus no one may be punished for entertaining or professing any religious belief or disbelief. The right to freedom of religious belief and to observe the requirements of that religion is a universal human right and applies to all prisoners/pre-trial detainees as well as to free persons. Prison regulations should include the right of qualified religious representatives to visit prisons regularly to meet prisoners. Facilities should be provided to all prisoners/pre-trial detainees who wish to observe their religious duties. This may include the right to pray in private at specified times of the day or night, to carry out various religious practices or to wear particular items of clothing.

These provisions should apply to all recognised religious groups and should not be restricted to the main religions in any country.

^{24A} (2004) AHRLR 205

Special attention should be paid to the religious needs of prisoners from minority groups. It is also important to ensure that prisoners who do not wish to practice a religion should not be obliged to do so. Prisoners should not receive additional privileges or be allowed to live in better conditions because of their religious affiliation or practice.

Nigerian Prison authorities seem to have recognised the fact that prisoners more than any other set of persons are in need of spiritual encouragement; more so as such exercise keeps the prisoners in a state of disposition that creates lesser problems for prison officials. Prisoners are therefore given necessary opportunities and facilities to exercise their religious freedom.

(4) The Right to Freedom of Expression

Section 39 (1) of the 1999 Constitution provides thus:

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

Prisoners/pre-trial detainees have a right to freedom of expression. The enjoyment of the right to freedom of expression could be accomplished through the writing and receiving of letters as well as visitation of by family and friends. It also covers the right of access to counsel both by awaiting trial prisoners and those whose convictions have been appealed against. The enjoyment of this right is paramount to the maintenance of the sanity of the prisoners because of their basic human need to express their thoughts and feelings about the situation in which they have found themselves. In the case of *Silver and Others v. United Kingdom*²⁴, the court held that there is a basic need to express thoughts and feelings including complaints about real and imagined hardships. The need is particularly acute in prisons as prisoners/pre-trial detainees have

²⁴ 2005) CHR 309

little choice of social contact, hence the importance of having access to the outside world by correspondence.

(5) The Right to Freedom from Discrimination

Section 42 (1) of the 1999 Constitution provides as follows:

(a) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:

(b) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places, of origin, sex, religions, or political opinions are not subject; or

(c) Be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.

Prisoners/pre-trial detainees' right to freedom from every form of discrimination is provided by the above section. As stated by the Constitution, they should be treated fairly and equally irrespective of their race, tribe, sex, religion, political opinion or place of origin. The practice of favouring some prisoners over others is contrary to the provisions of Section 42. However, it is important to note that where prisoners are isolated on grounds of ill-health or medical conditions, this does not amount to discrimination. In the case of *Odafe and Others v The Attorney General of the Federation*,²⁵ the ambit of the right to freedom from

²⁵ (2005) CHR 309

discrimination was considered as a result of the claim by the applicants that the acts of segregation and discrimination against them by both prison officials and inmates amounted to an infraction of their right to freedom from discrimination under Section 42 (1) (a) of the 1999 Constitution. The Court held that the right to freedom from discrimination as enshrined in Section 42 (1) of the Constitution did not cover discrimination by reason of illness, virus or disease and the applicants could not therefore invoke Section 42 (1) on the argument that they have a right to exercise under that section. It should be noted that an isolation on grounds of ill-health is only for infectious diseases. No other cases are permitted for isolation. It is not right to isolate HIV/AIDS patients who are prisoners since HIV/AIDS is not an infectious disease.

(6) The Right to Remain Silent

Section 35 (2) of the 1999 Constitution provides that Any person who has been arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his choice.

As such any arrested or detained person reserves the right to remain silent. The purpose of the constitutional right to remain silent under Section 35 (2) of the constitution is to provide a pre-trial protection against the practice of eliciting incriminating statements from suspects by means of physical or psychological coercion in order to reduce the ordeal of the arrested person. The words "silent" or "answering" in section 35 (2) suggests that the arrested or detained person cannot be compelled to make a statement to give information by oral communication. A person exercising this right may refuse to give not only answers which constitute an admission of guilt but also those which merely furnish evidence of guilt or supply leads to obtaining evidence. The above subsection places on the police or other law enforcement agents the duty to warn an arrested person of his right to silence before interrogating him, otherwise, any statement

elicited from a suspect during such interrogation will be inadmissible for violating the constitutional right. This is so because warning is a prerequisite right to interrogation.²⁶

(7) The Right to be Presumed Innocent until Proved Guilty

Section 36 (5) of the 1999 Constitution provides thus:

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon such person the burden of proving particular facts.

Based on the above subsection, every pre-trial detainee has the right to be presumed innocent until proven guilty. This is because they have not been convicted of any offence stipulated by law even though they may be viewed as suspects. It is left for the prosecution to prove their guilt beyond reasonable doubt and the court to convict and sentence them upon the evidence adduced during the trial.

The practice of treating pre-trial detainees as if they are convicted felons is unconstitutional. This is the position under our constitution as well as other International laws/instruments. In *Oloruntosin v The State*²⁷ the appellant was arraigned before the High Court Abeokuta, Ogun State on a three-count charge of conspiracy and armed robbery. He had since been in detention. He was alleged to have conspired with two others at large to rob the complainants of large sums of money at Abeokuta while armed with a cutlass. The appellant gave evidence in his defence and did not call any other witnesses. He denied being at the scene of the robbery and testified that he was on a motor-bike when someone

²⁶ Ladan, M.T (1998), *Crime Prevention and Control and Human Rights in Nigeria*, Econet Publishing Company Limited, p. 219 at 222.

²⁷ (2007) All FWLR (Pt. 396) 702

cut the strap of his bag and the knife also sliced him in the abdomen, and while bleeding he fell to the ground and was later arrested by the police. At the close of the trial, the trial judge found the appellant guilty as charged on all three counts and sentenced him to death by hanging. Aggrieved, the appellant filed an appeal. The Court of Appeal held *inter alia* that a defendant even if caught in the act of committing the offence is presumed innocent until he is proved guilty. There is therefore no question of a defendant proving his innocence before a law court.

In the case of *Femi Oladotun v The State*²⁸, the defendant a 2nd year sociology student of University of Ilorin, Kwara State while in his car with three other persons was stopped by the police. He refused to stop but was eventually arrested. On searching him, and the car, a foreign made gun and live cartridges were found in the car; other occupants of the car had fled. He was detained and subsequently charged in court on a charge of illegal possession of arms contrary to Section 3 (1) of the Robbery and Firearms (Special Provisions) Act.²⁹ The court held *inter alia* that by the provisions of Section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria, the right to the presumption of innocence is guaranteed.³⁰

²⁸ (2010) All FWLR (Pt. 532) 1686

²⁹ Cap R11, Laws of the Federation of Nigeria, 2004

³⁰ See also the following cases: *Kazeem v The State* (2009) All FWLR (Pt. 465) 1749; *Olabode v The State* (2007) All FWLR (Pt. 389) 1301.

(8) The Right to Adequate Time and Facilities to Prepare for his Defence.

Section 36 (6) (b) of the 1999 Constitution provides that every person who is charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence.

The right to adequate time and facilities in preparing for the defence is another pre-trial right vested in defendant/pre-trial detainees under the Nigerian Constitution and criminal process. Due to the intervals between arrests, arraignments and the ultimate prosecution of suspects, there are provisions for granting bail to suspects pending the conclusion of police investigations or judicial trials.

The grant of bail, whether by the court or the police is a matter of discretion though bail will normally be granted to a suspect charged with non-capital or bail-able offences. In cases involving capital offences bail is rarely granted. Where the grant of bail is denied due to the nature of the offence charged, the pre-trial detainee must be allowed adequate time and facilities to prepare for his defence. It should be noted that our rules of Criminal Procedure³¹ and Prison regulations permit persons in custody access to their counsel at all reasonable times. Arbitrary discretion is however daily exercised by the police and other law enforcement agents who deny accused persons access to counsel while in custody.

Pre-trial interviews between the pre-trial detainee and his counsel should be conducted in an atmosphere of utmost confidentiality required for client and counsel relationship. The presence of the police or other law enforcement agents during pre-trial interviews should be discouraged as this scuttles free flow of information between the defendant and his counsel. It suffices to state that such

³¹ Section 211 (2) Criminal Procedure Act

arrangements can hardly be reconciled with the constitutionally guaranteed right of suspects to adequate facilities for the preparation and the conduct of their defences.³²

(9) The Right to Defend Himself or Be Represented by Counsel During Trial

Section 36 (6) (c) of the 1999 Constitution provides that every person who is charged with a criminal offence shall be entitled to defend himself in person or by a legal practitioner of his choice.

Furthermore, where a defendant on trial for a capital offence is unrepresented, the court shall assign a legal practitioner for his defence.³³ The provision of the right to counsel applies universally to all criminal trials. This right is doubtlessly one of the most pervasive and precious rights to be enjoyed by defendants or suspects under Nigerian Constitution. As an indispensable component of the right to fair hearing, the right to be represented by counsel is designed to facilitate the attainment of justice as the defendant who may not be learned in law could have his case dispassionately presented in court by a qualified legal practitioner who is trained for that purpose. This right always carries with it the requirement that the counsel must be one freely chosen by the defendant himself. In view of the above, can a lawyer assigned by the court or the Legal Aid Council to a suspect for his defence be said to be a legal practitioner of the suspect's choice? The question could be answered in the affirmative only if the suspect was informed that he could accept or reject the counsel assigned to him by the state. Under the Nigerian Legal Aid Scheme, it is doubtful whether in practice a poor defendant to whom a lawyer has been assigned has any choice whether to accept or reject him or her. In the case of *Udofia v The State*,³⁴ counsel for the defendant assigned

³² Osipitan, T. (1993), "Safeguarding the Right to Counsel under the Nigerian Criminal Process" *Journal of Human Rights Law and Practice*, Vol.3, 1993, p.145

³³ Section 352 of the Criminal Procedure Act

³⁴ [1983] 3 N.W.L.R (Pt. 84) p.533

by the Legal Aid Council was absent without just cause more than nine times during the presentation of the prosecution's case against the defendant. The Supreme Court described the trial in the lower court as a mockery of a trial and far from being fair and therefore ordered a re-trial. As Oputa JSC said:

That it is fundamental to a fair trial of a criminal charge like murder that the accused person should not be left unrepresented by counsel at any stage of the trial. Failure of counsel briefed for the defence to attend court thus leaving the accused to be tried as an unrepresented person is tantamount to depriving the accused of the right which he had to be defended by counsel. In this case on appeal counsel was absent most of the time and when present he did not conduct the case with the degree of commitment expected of him, the other counsel assigned to take over was also unimpressive. It cannot be said therefore that the appellant had a fair trial.

The essence of this case is to emphasise that indigent prisoners to whom counsel has been assigned must be informed that they have the right to reject such counsel where there are good reasons for that.

Furthermore, the provisions of section 36 (6) (c) of the 1999 Constitution affords a suspect the right to defend himself in person as an alternative to being defended by a legal practitioner. However, this is like setting a trap for such a defendant because the intricate rules of procedure, evidence and pleadings are not easy for lawyers to comprehend let alone for a layman. The fact that our constitution seems to permit laymen to defend themselves is therefore capable of negating the right to counsel and fair hearing guaranteed by the constitution.

The American Supreme Court in the case of *Powell v Alabama*³⁵ pointed out the dangers faced by an accused defending himself without the assistance of counsel:

The right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small, sometimes no skill in the science of law. If charged with crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence: Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.³⁶

Finally, it is of utmost importance that the rights of detainees under the Constitution are recognised and observed.

4.7 AN EXAMINATION OF THE HUMAN RIGHTS OF PRISONERS AND DETAINEES UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The rights of prisoners/pre-trial detainees are not only guaranteed by our domestic laws but also by international conventions/instruments. These include:

1. The Convention against Torture³⁷;
2. The Universal Declaration of Human Rights³⁸;

³⁵ (1982) 287 U.S. 45:53:77 L.Ed, 158

³⁶ For further discussion, see Akinseye-George, Y., *Improving Judicial Protection of Human Rights in Nigeria*, *op. cit.*, Pp. 203-206.

³⁷ The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is an international human rights instrument of the United Nations which came into force on the 26th of June 1987.

³⁸ The Universal Declaration of Human Rights was proclaimed and adopted in 1948 by members of the United Nations as a common standard of achievement

3. The International Covenant on Civil and Political Rights³⁹;
4. The African Charter on Human and Peoples' Rights⁴⁰, etc.

(1) The Rights of Prisoners/Pre-trial Detainees under the Convention Against Torture (CAT)

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is an international human rights instrument of the United Nations that aims to prevent torture around the world. The Convention requires states to take effective measures to prevent torture within their borders, and forbids states to return people to their home country if there is any reason to believe they will be tortured.

Article 2 of the Convention provides that state parties shall take effective legislative, administrative, judicial or other measures to prevent acts of torture.

Article 4 of the Convention further provides that state parties shall ensure that the acts of torture are serious criminal offences within its legal system.

The essence of Articles 2 and 4 of the Convention is to protect prisoners/detainees from any form of torture by law enforcement agents in order to compel them to divulge information while under

for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the territories under their jurisdiction.

³⁹ The International Covenant on Civil and Political Rights is one of the three components of the International Bill of Rights.

⁴⁰ The African Charter on Human and Peoples' Rights also called the Banjul Charter was developed under the aegis of the Organization of African Unity (since replaced by the African Union) and came into force on 21st October 1986.

incarceration. Article 14 also provides that state parties must ban the use of evidence produced by torture in their courts. The aim of the above is to ensure that all evidence produced from torture will not be admissible against any prisoner/pre-trial detainee. Consequently, law enforcement officers must not resort to using torture as a means of obtaining evidence.

(2) The Rights of Prisoners/Pre-Trial Detainees under the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) has its foundation in the Universal Declaration of Human Rights. The rights guaranteed by this covenant are the basic rights which are generally enforceable by judicial action in the legal system of democratic countries. Under this covenant, all human beings inclusive of prisoners/pre-trial detainees have the following rights:

- (a) Article 4(1) and 4(2) of the Covenant provides for the right to life, freedom from torture and slavery, the freedom from retrospective law, the right to personhood and freedom of thought, conscience and religion;
- (b) Articles 12, 13, 17 to 24 also provide for procedural fairness in law in the form of equality before the courts, rights to due process, fair and impartial trial the presumption of innocence, and recognition as a person before the law.

It is also important to note that Article 10 of the Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(3) The Rights of Prisoners/Pre-Trial Detainees under the Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is the first comprehensive and universal instrument in the history of mankind formulating the human rights and fundamental freedoms of all human beings including prisoners and pre-trial detainees. The various rights under the UDHR are as follows:

- (a) Articles 1 and 2 of the Charter provide that all human beings are born free and equal in dignity and rights, endowed with reason and conscience and are equally entitled to the rights and freedoms provided in the Charter without discrimination of any kind arising from his or her personal status. Thus, prisoners as well as pre-trial detainees are entitled to the rights listed in the Charter except for certain rights which are restricted on account of their incarceration;
- (b) Individual or Personal Rights- The first category of rights are regarded as individual/personal rights because they form the basis of human existence and include the right to life, liberty and security; right against slavery, servitude and the right against torture, cruel inhuman or degrading treatment.⁴¹

In the case of pre-trial detainees, the Charter also affords them the right to public hearing by independent and impartial tribunals, the right to be presumed innocent until proven guilty in criminal trials and right against retrospective penal laws at national and international levels.⁴²

Article 18 of the Charter also provides for the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and the freedom either alone or in the community with others and in public or private, to manifest his

⁴¹ Articles 3, 4, and 5 of the Charter

⁴² Articles 7, 8, 9, 10 and 11 of the Charter

or her religion or belief in teaching, practice, worship and observance.⁴³

(4) The Rights of Prisoners/Pre-trial Detainees under the African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights also called the Banjul Charter was developed to promote the rights of individuals and peoples of Africa. It provides that all individuals including prisoners and detainees are entitled to the following rights among others:

- (a) The right to freedom from discrimination (Article 2 and 18(3));
- (b) The right to equality- all humans are entitled to be treated equally (Article 3);
- (c) The right to life and personal integrity (Article 4);
- (d) The right to dignity and freedom from cruel, inhuman and degrading treatment (Article 5);
- (e) The right to freedom of religion (Article 8);
- (f) The right to the provision and access to good health care (Article 16); and
- (g) The right to self-determination (Article 20).

4.8 THE RIGHTS OF PRISONERS/PRE-TRIAL DETAINEES UNDER OTHER INTERNATIONAL STANDARDS

In addition to the above-mentioned international human rights instruments, there are international standards which provide guidelines for the treatment of prisoners and detainees. These include:

⁴³ See Udombana, N., *op. cit.*, p.24.

The United Nations Standard Minimum Rules (SMR) for the Treatment of Prisoners⁴⁴:

The SMR provides inter alia for the right to good living conditions/ accommodation. Specifically, Rule 9 (1) provides for sleeping accommodation in individual cells or rooms to be occupied by one prisoner. Under Rule 9(2) it is stipulated that where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. Rule 10 provides that accommodation of prisoners/detained persons should meet all requirements of health, which include minimum floor space, lighting, heating and ventilation having due regard to climatic conditions such as cubic air content. Rule 11 provides that in all places where prisoners are required to live or work:

- (i) The windows shall be large enough to enable the prisoners to read or work by natural light and shall be so constructed that they can allow the flow of fresh air;
- (ii) Artificial light shall be provided sufficient for the prisoners to read or work.

Rule 12 provides that sanitary arrangements shall be made adequate to enable every prisoner to comply with the needs of nature.⁴⁵ On the right to bed and bedding, the SMR further provides in Rule 19 that every prisoner shall be provided with separate bed as well as separate and sufficient bedding which shall be issued clean, kept in good order and changed often enough to ensure cleanliness. Other rights provided in the SMR include:

- (a) The Right to good clothing: The prisoner/detainee is entitled to adequate clothing as provided by the SMR to the effect that every prisoner not allowed to wear his own clothing shall be provided with clothing suitable for the climate and adequate to keep him in good

⁴⁴ See Rules 9-21 of the SMR.

⁴⁵ Cole, A., *A Human Rights Approach to Prison Management*, *op. cit.*, p.44

health; such clothing shall in no way be degrading or humiliating.⁴⁶

- (b) The Right to Good Feeding: The SMR provides for food of nutritional value adequate for health and strength and of wholesome quality, well prepared and served the prisoners/detainees at the usual hours as well as for drinking water whenever needed.⁴⁷
- (c) The right to exercise and sports, the right to good medical services and the right to freedom of expression.⁴⁸

A visit to most Nigerian prisons would reveal clearly that the facilities provided the prisoners/detainees are far from the minimum standard described above. However, the problem is not that the facilities are not there but rather that the overcrowding of the prisons by awaiting trial detainees has dealt a terrible blow on the facilities, badly overstressing them. Prisons that were built during the colonial era and intended to be occupied by a number of convicted prisoners are now keeping awaiting trial persons far beyond the envisaged maximum capacity. The criminal justice system needs to be revived in order to be able to reduce the population of awaiting trial persons who can then be properly distributed to some of the prisons in the non-urban centres which are usually not as congested as the ones in the cities. The overcrowding of the prisons in the cities is due mainly to the fact that most awaiting trial detainees are kept in the urban prisons where security is tighter in order to reduce the risk of jail breaking and ensure that they are nearer the courts of trial. The entire criminal justice system must be overhauled in order to improve the conditions of the prisons which are but a passive recipient of those sent in by the inefficient justice system.

⁴⁶ Rule 17 (1)

⁴⁷ Rule 20(1) and (2).

⁴⁸ Rules 21,22-26,35-36

4.9 THE RIGHT OF VULNERABLE PRISONERS

All persons are equal before the law and are entitled to equal protection of the law. While detention should be used only when necessary for all persons, the greater risk and potential damaging effects of imprisoning groups of vulnerable persons such as women and children implies that their detention must be carried out with greater caution and care in order to minimise the effects of incarceration on their human rights.⁴⁹

4.9.1 Female Prisoners

The proportion of women in prison in any prison system throughout the world varies between 2% and 8%. One consequence of this small proportion is that prisons and prison systems tend to be organised on the basis of the needs and requirements of the male prisons. In a number of countries tough anti-drugs legislation has had significant effect on the numbers of women in prison and, as a result, the rate of increase in the number of women prisoners is often greater than men. In some countries, such as the United Kingdom, this has also led to an increase in the numbers of foreign national prisoners who now form a disproportionately large percentage of women prisoners.⁵⁰

In most societies, women have a primary responsibility for the family particularly when there are children involved. This means that when a woman is sent to prison the consequences for the family which is left behind can be very significant. When a father is sent to prison, the mother will frequently take on his family responsibilities as well as her own. When a mother is sent to prison, the father who is left with the family frequently finds it difficult to take on all parental duties especially if there is no wider family support. In most cases the mother may be the sole carer.

⁴⁹ See Akinseye-George, Y., *Justice Sector Reform and Human Rights in Nigeria*, *op. cit.* p. 284.

⁵⁰ Cole, A., *A Human Rights Approach to Prison Management*, *op. cit.* p.131

This means that special provisions need to be made to ensure that women prisoners can maintain meaningful contact with their children.⁵¹

While other instruments and standards referred to above are also applicable to women, the principal legal instrument regulating the rights of women specifically is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵² It provides:

- (i) Freedom from Discrimination: (Article 2): State Parties condemn the discrimination against women in all its forms, agree to pursue by all appropriate means and without a delay a policy of eliminating discrimination against women and, to this end, undertake;
- (ii) To embody the principle of equality of men and women in their national constitutions and other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (iii) To adopt appropriate legislative and other measures, including sanctions where appropriate prohibiting all discrimination among women;
- (iv) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (v) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

⁵¹ *ibid.*

⁵² The United Nations General Assembly on 18th of December 1979 adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention is the first global treaty aimed at the full and equal participation of women in politics, civil, economic, social and cultural rights at the national, regional and international levels and the elimination of all forms of sex and gender-based discrimination against women.

- (vi) To take all appropriate measures to eliminate discrimination against women by any person, organisation or group;
- (vii) To take all appropriate measures including legislation to modify or abolish laws, regulations, customs, and practices which constitute discrimination against women;
- (viii) To repeal all national penal provisions which constitute discrimination against women.

All over the world, prisons are male dominated. It is estimated that on the average, 19 out of every 20 prisoners are men. What this implies is that prisons tend to be managed from a male perspective. Thus the procedures and programmes are designed for the needs of the majority male population and adapted (sometimes not) to the needs of women.⁵³

Discrimination may be by way of limited availability of prison accommodation for women. There should be equal facilities provided for men as well as women.⁵⁴ There should also be equal access to activities. Because of their smaller numbers or because of restricted accommodation the access which women prisoners have to activities is often more limited than that available to men. For example, there may be fewer opportunities for education or skills training. Women should have the same opportunities as male prisoners to benefit from education courses and skills training.⁵⁵

Furthermore, the right of female prisoners to healthcare deserves special attention: Women prisoners have specific health needs which have to be recognised and attended to. Wherever possible, they should be attended to by women nurses and doctors. Pregnant prisoners should only be held in prison in the most extreme circumstances. If this is necessary, they should be provided with the same level of health care as is provided in civil society. When the time comes to give birth such women should whenever

⁵³ Cole, A., *ibid*, p.137

⁵⁴ *ibid*.

⁵⁵ *ibid*

possible be transferred to a civilian hospital. This should ensure that professional medical care is available.⁵⁶

4.9.2 Juveniles (Children in Conflict with the Law)

The second category of vulnerable prisoners consists of children in conflict with the law. Article 1 of the Convention on the Rights of the Child defines a child as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. Similarly, The UN Rules for the protection of Juveniles Deprived of their Liberty⁵⁷, Rule 11 defines a juvenile as every person under the age of 18.

In addition to the principles described above which equally apply to children held in custody, there are special considerations to be taken into account in respect of the management of juvenile and young prisoners. Prisons should only be used to hold individuals who have committed very serious crimes and who pose a threat to society. Very few juveniles fall into these categories. The basic principle is that children who fall into this category should be held in prison only when there is absolutely no available alternative.⁵⁸

If a young person have to be kept in prison, special arrangements should be made to ensure that the coercive elements of prison life are kept to a minimum and that maximum use is made of the possibilities for training and personal development. A special effort needs to be made to help the young person to maintain and to develop family relationships.⁵⁹

⁵⁶ *ibid*, pp.132-133

⁵⁷ The United Nations Rules for the protection of Juveniles Deprived of their Liberty came into force in 1948 to protect the rights of young persons involved in the commission of offences.

⁵⁸ See Akinseye-George, Y. (2009), *Juvenile Justice in Nigeria*, (Centre for Socio-Legal Studies, Abuja) p. 83

⁵⁹ *ibid*. p. 88

The Convention of the Rights of the Child makes copious provisions for the protection of the rights of children.

- (a) The Right to be treated with Dignity: Article 37(1) (c) provides that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person. Efforts should be made to provide juvenile offenders with good accommodation, clothing, feeding, sanitary conditions etc that will aid their stay in the remand institutions.
- (b) Right to be kept separately away from Adults: Rule 13 of the UN Standard Minimum Rules for Juvenile Justice provides that juveniles under detention pending trial shall be kept separate from adults and shall be detained in separate institutions or in separate parts of an institution also holding adults. This is to ensure they are monitored so as to reform and rehabilitate them appropriately;
- (c) Juveniles held in custody are also entitled to receive care, protection, and all necessary individual assistance-social, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality.⁶⁰
- (d) Juveniles also have the right to maintain close links with their family.⁶¹

4.9.3 The Rights of Prisoners on Death Sentence

Prisoners under the sentence of death constitute a category of vulnerable prisoners who merit special consideration and protection due to the nature of their sentence. Prison authorities

⁶⁰ *ibid.*

⁶¹ Cole ,A, op cit, p. 126.

have a special obligation to treat such prisoners decently and humanely.⁶² Other rights that deserve special mention in relation to this category of prisoners include the right to dignity of the human person, equality of treatment, right to counsel, right to regular visitation. It cannot be overemphasised that the death sentence cannot be carried out until the prisoner has exhausted all rights of appeal or review provided by law.

4.10 THE RIGHTS OF FOREIGN NATIONAL PRISONERS

In many prison systems there are many foreign national prisoners whose families are resident in other countries. Special attention should be given to their needs. This is because they are alien to the culture and environment in which they serve their sentence.⁶³ Thus in addition to the other rights mentioned above, foreign national prisoners are entitled to certain special rights.

Foreign prisoners should be allowed to make contact with the diplomatic representative of the country to which they belong. In this respect, Article 6 of the Vienna Convention on Consular Relations is instructive. It provides that:

With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

- (a) Consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;
- (b) If he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending State if, within its consular district a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to

⁶² *ibid*, p.130

⁶³ *ibid*, p.102

the consular post by the person arrested, in prison, custody or detention shall also be forwarded to the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

- (c) Consular offices shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular offices shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Similarly, Rule 38 of the Standard Minimum Rules for the Treatment of Prisoners provides thus:

- (a) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong;
- (b) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task is to protect such persons.

For many of these prisoners there may be little or no possibility of receiving visits from family or friends. The prison authorities should make special arrangements to allow them to maintain contact with their families. This may be permitting additional letters with free postage or it may be by allowing such prisoners to make periodic telephone calls to their families at the expense of the administration. In many cases contact with the prisoner's diplomatic representative may be difficult or infrequent. The prison authorities should also consider whether there are other foreign nationals in the local community who could provide a

voluntary visiting service which would enable such prisoners to maintain some contact with their own culture.⁶⁴

4.11 CONCLUSION

Prisoners and detainees by virtue of their humanity still retain their rights, human and civil, as guaranteed by national, regional and international instruments, albeit with certain limitations. These rights have been examined in the light of relevant instruments. It has also been established that prisoners and detainees must not be subjected to arbitrary treatment by prison and detaining authorities but to internationally acceptable minimum standards of treatment in conformity with their dignity as human beings.

Improving the situation of Nigerian prisoners requires an effective and functioning judiciary without which, the condemnable practice of keeping large numbers of awaiting trial persons in Nigerian prisons for long periods of time will continue. It is necessary to accelerate the trial of all persons detained without trial. Prison and detention officials should be trained on the rights of prisoners and the need for such rights to be respected. There is need for the government to address the issues which challenge the full realisation and enjoyment of the human rights of the prisoners. Law clinics have an important role to play is not only in bringing the plight of prisoners to the attention of the authorities but also in working through the criminal justice system to help in advancing the protections of the rights of prisoners and pre-trial detainees.

⁶⁴ *ibid* p.103

CHAPTER 5

Access to Justice

OUTCOMES

- (i) Explain the meaning, scope and importance of access to justice and discuss the challenges;
- (ii) Explain and discuss the operation of legal aid in Nigeria.

5.1 MEANING, SCOPE AND IMPORTANCE OF ACCESS TO JUSTICE

Meaning

Access to justice also refers to the substantive and procedural mechanisms designed to ensure that the citizens have opportunity of seeking redress for the violation of their legal rights within that legal system. It includes other variables like the physical conditions of the premises where justice is dispensed and the quality of the human and material resources available.

Scope and Importance

According to Oputa,¹ access to justice can be looked at from either the narrow or the wider sense. In the wider sense, it embraces access to the political order, and the benefits accruing from the social and economic developments in the state. It is also the equal distribution of the economic resources in a society. According to

¹ Oputa, C. A.,(1989), "Rights in the Political and Legal Culture of Nigeria", Idigbe Memorial Lectures, Lagos, *Nigerian Law Publications*, Ltd, p.50.

the Penal Reform International,² officials often consider the notion of access to justice as the sole province of the state justice system. However, in many rural and some urban communities western-styled justice is distrusted and avoided by most. Recognising the above situation, the Penal Reform International recommended that:

Access to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice.

In the narrow sense it refers to access to the law court. This narrow approach, according to proponents, is a condition for access to justice.³ Access to the court means approach or means of approaching the court for redress without restraint.

In the case of *Amadi v Nigerian National Petroleum Corporation*,⁴ Karibi-Whyte, JSC said:

In my opinion a legitimate regulation of access to courts should not be directed at impeding ready access to courts. There is no provision in the Constitution for special privileges to any class or category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the court of its

² Penal Reform International, *Access to Justice in Sub Saharan Africa: The Role of traditional and Informal justice system* (Scharfe W., ed.), 2000, cited in Stapleton, A., "An Introduction and Overview of Legal Aid in Africa", *Access to Justice in Africa and Beyond*, p.4.

³ Okogbule, N., (2005), "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects", *Sur International Journal on Human Rights*, No. 3 Year 2, English Edition, Human Rights University Network Sur, pp.96-97; Martin, E. A.,(ed.) 8th ed., pp.96-97.

⁴ *Supra*, at 1553. See also the recent case of *Igwe v Ezeanochie* (2010) 7 N W L R (Pt. 1192) 61 at 92 where the Court of Appeal categorically stated that it is indeed the duty of the courts to protect the constitutionally guaranteed rights of the citizens.

constitutional jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of section 6(6) b of the Constitution.

Therefore, access to justice is a concept that embraces the nature, mechanism and even the quality of justice obtainable in a society as well as the place of the individual within the judicial matrix. It is also an important barometer for assessing not only the rule of law in any society but also the quality of governance in that society. It emphasises that the system must be accessible to everyone, and secondly that access must be meaningful and effective.⁵ The importance of ensuring that majority of the people who cannot afford legal services are able to enforce their rights by legal representation through legal aid is at the root of access to justice. It also ensures that indigent persons have access to the legal system. Where a person cannot get the help they need, it is said that they are being denied access to justice. Access to justice involves both an open system of justice and also being able to fund the costs of a case⁶. The problem of cost still remains a major hurdle.

Access to justice also involves a host of other activities. These include legal empowerment initiatives, a range of civil justice and related activities that advance the rights and legal capacities of the poor. Without legal aid the poor will never even enter a court house or any other justice forum. It is not surprising that in many Commonwealth countries, people may prefer to use the traditional justice systems to resolve their legal problems. Yet to use the traditional justice systems may have their own shortcomings and there are times when resort to traditional methods of justice is inappropriate or not available.⁷

⁵White, R. C. A. (1985), *The Administration of Justice*, New York, Basil Blackwell, p. 266.

⁶Martin, J, (2005), *The English Legal System*, 4th Edition, Hodder Arnold, p.262.

⁷See *Access to Justice in the Commonwealth: Some Current Trends*, Paper prepared on behalf of the Commonwealth Secretariat by the CLEA for the Meeting of Senior Officials of Commonwealth Law Ministers, 18-20 October 2004, Commonwealth Legal Education, June 2005, Vol. 99 p.21.

According to Okogbule,⁸ there is an interface between access to justice or the provision of legal aid and human rights protection. This is because it is only when individuals have access to the courts that they can espouse and seek the protection of their basic rights. This will also instil faith in the judiciary. The stability of the society depends upon the ability of the people to readily obtain access to justice through access to the courts. Denying access to justice through the courts forces dispute resolution into other areas and results in individuals (and groups) taking to self-help, vigilantism and violence.

Access to justice is therefore firmly founded on the rule of law which principle operates on the twin prolonged notion of the supremacy of the law and equality before the law.⁹ Without access to justice it is impossible to enjoy and ensure the realisation of any right, whether civil, political, social or economic.

Equal access to the courts requires the right to counsel and legal representation for all citizens especially those who cannot afford legal services. In the case of *Solomon Ogboh v Federal Republic of Nigeria*,¹⁰ Ogwuegbu JSC as he then was held that the right to counsel is the root of fair hearing and its necessary foundation. According to Mcquoido Mason:¹¹

legal representation ensures access to justice which is an integral aspect of the concept of social justice which refers to the fair distribution of health, housing, welfare, education and legal resources in society including where necessary the distribution of such resources on affirmative basis to the disadvantaged members of the community.

⁸ Okogbule N. S., *loc. cit.*

⁹ Friedman, M. D. A., (2001), *Lloyd's Introduction to Jurisprudence*, (7th ed.) Sweet and Maxwell Ltd., p. 592

¹⁰ (2002) 10 NSCQR (Pt. 1) 498 at p. 509

¹¹ Mcquoido Mason, D. J. (1982), *An Outline of Legal Aid in South Africa*, Butterworths S.A., p.1

In practical terms, it implies that trials cannot be regarded as fair if defendants lack legal representation and therefore unable to participate at the trial on an equal footing with the prosecution or other parties. It requires that citizens who are unable to hire the services of lawyers must be assisted by the state with the provision of legal assistance.

In view of the above and considering the high cost of litigation, accessible and functional legal aid scheme in a given legal system becomes the essential bedrock of the right to access to justice.¹² Any society that respects the rule of law and democracy must provide all its citizens with both equal and effective access to justice which makes human rights effective and furthers the rule of law.¹³ According to Rekosh:¹⁴

The provision of equal access to the benefits and protection of the law is one of the most consistently elusive challenges to democratic legal systems around the globe.

Access to justice is important because it constitutes the most important part of legal reform and it is necessary for making rights a reality in the lives of the poor. In terms of access to the courts, courts proceedings are technical, complex and confusing. Therefore it is important that a lawyer who understands the procedures should always represent a lay person. Access to justice is also important because a teeming population of Nigerians cannot afford to pay for the services of a lawyer. It is therefore needful to provide legal assistance and empowerment for those persons in

¹² See Ladan, M. T., (2007), *Biodiversity, Environmental Litigation, Human Rights and Access to Environmental Justice*, Zaria, Faith Publishers pp.54-56. See also Miller David, (1970), *Some Justice*, Oxford Clarendon Press, p 54

¹³ See Legal Resources Consortium, Lagos, Nigeria, April, 2000; "Discussion Paper on Transforming the Provision of Legal Aid Services in Nigeria" p. 1, quoted in Ladan, M. T., *ibid*.

¹⁴ Rekosh et. al., eds., (2001), "Access to Justice, Legal Aid for the Unrepresented" in *Pursuing the Public Interest*, New York Columbia University School of Law, p 21

need. Legal assistance is also important for purposes of facilitating proceedings in court. This is because legal aid officers do not need an explanation of what is going on in court and therefore this saves time.¹⁵

5.2 CHALLENGE TO ACCESS TO JUSTICE

There are challenges to the realisation of access to justice in most jurisdictions. The following are some of the challenges.

5.2.1 ECONOMIC FACTORS

Avoidance of the legal system due to economic reasons is one factor. The commonest hindrance to getting justice in Nigeria is poverty or lack of funds to prosecute or defend claims. The financial barrier has been recognised in all jurisdictions as the central impediment to access to justice.¹⁶ In Nigeria and elsewhere in Africa, poverty is a reality and the commonest hindrance to obtaining justice.¹⁷ The cost of bringing ordinary citizens into the formal legal system is frequently prohibitive.

Poverty, according to Late Obafemi Awolowo, is a condition which exists when a person lacks the means to satisfy the necessities of life.¹⁸ He stated that though there are no statistics on the point, anyone who has been to all parts of Nigeria, will readily agree that more than 70 million of our estimated 80 million people¹⁹ live in abject poor conditions and less than 60 million of

¹⁵ See Akinlamii, N., (1999-2007), *Legal Aid Reforms. Reforming for Justice. A Review of Justice Sector Reforms in Nigeria*, Access to Justice, Lagos, p 29

¹⁶ Banire, M. A., *op. cit.*, p 93

¹⁷ See Malemi, E., (2009), *The Nigerian Legal System. Text and Cases*, Third Edition, Lagos, Princeton Publishing Co, p 420

¹⁸ Awolowo O., (1981), *Path to Nigerian Greatness*, Enugu, Fourth Dimension Publishers Co Ltd, p 76.

¹⁹ The population of Nigeria is now estimated to be over 150 million and according to the recent United Nations Development Report about 64 per cent of Nigerians live in abject poverty.

them are actually starving. To him, some Nigerians dwell in houses and shelters unsuitable for poultry or piggery. The vast majority of our people live in rural areas which are neglected and almost forgotten.²⁰ Poverty is also seen as another form of slavery and in the words of Justice Oputa, most Nigerians are poor at one time or the other during their lives, but many Nigerians are poor all of their lives.²¹ Examining the uneasy access to the poor to enjoyment of the right to fair hearing and equality before the law, the eminent jurist further said:

What is the value of say, fair hearing to the poor man who cannot pay summons fees, let alone afford the services of counsel.²²

The effect of poverty is that the practical actualisation of the fundamental rights cannot be achieved where millions are living below starvation level.

5.2.2 SOCIAL FACTORS

Illiteracy and ignorance

Another significant obstacle to the realisation of access to justice in Nigeria is the high level of illiteracy prevalent in the country today.²³ This is because education has the effect of empowering the people to maximise the opportunity and resources available in their environment. An educated man will easily adapt to the realities of the situation and have the intellectual capacity to insist on the enforcement of his rights, quite unlike the illiterate. Legal rights are all worthless unless they can be enforced.²⁴ Freedom of speech and freedom of the press do not mean much for a largely illiterate rural community completely absorbed in the daily rigours

²⁰ Awolowo, O., *ibid*, p 118

²¹ Oputa, C. A., *op. cit.* pp. 66-67

²² *Ibid*, p 68

²³ *Ibid*, p 105

²⁴ Elliot, C and Quinn, F.(2002), *op cit.*, p. 207

of the struggle for survival.²⁵ According to Abiola Ojo, democracy is not safe in a country where a large majority of the population is illiterate. Their inability to understand the problems of government is readily visible. Worse still they become very strange bed fellows to politicians who make extravagant promises.²⁶ Many people do not know what their legal rights are and do not know when they have a remedy for breaches of the constitutional and other rights. They often do not even know that they can ask for a lawyer to represent them from the moment of their arrest and, as is the case in most Commonwealth jurisdictions, that they have a right to silence.²⁷

Fear or a sense of futility of purpose

There is also the problem of fear. Most people have a fear dealing with lawyers. They feel intimidated by the legal system. This constitutes a psychological barrier which is usually associated with the underprivileged and generally results from their sense of fear, hopelessness and unfamiliarity with the legal system. This also leads to their avoidance of the process. This fear is also influenced by the potential effect of the realisation of access to justice which has an inherent capacity to shift the power equation.

Corruption and abuse of authority and power

The issue of corruption is one that has eaten deep into the key fabric of the society and has drastically affected the legal system. The so called legal justice that is obtained in our courts has been

²⁵ See Ake, C., *The African Continental Human Rights* –A paper presented at the International Conference on Human Rights in African Context, Port Harcourt, June 9-11, 1998

²⁶ Ojo, A., (1981), *Development of the Executive under the Nigerian Constitution*, 1960, Ibadan University Press, 169

²⁷ See *Access to Justice in the Commonwealth. Some Current Trends*, *op. cit.* p. 24

commercialised.²⁸ Allegations of corruption and abuse of office on the part of judicial officers are on the increase. It is so bad that in certain situations parties have to pay lawyers, judges, the police, and court administrators to get access to justice or perpetrate injustice in our courts. The situation is so common at the lower bench (like summary courts) where some magistrates conspire with policemen and lawyers to trade in the liberty of fellow citizens by encouraging the police to arrest without any lawful justification. Court clerks, registrars, judges, the police and some members of the bar are involved in corruption in the administration of justice. Lawyers have been known to approach judges on behalf of litigants to induce such judges to pervert the course of justice.²⁹ There is abuse of authority and powers by judicial officers and law enforcement agents resulting in substandard investigations, unlawful searches, seizures, detention, imprisonment, and cover-ups.

5.2.3 LAWS AND LEGAL LIMITATIONS

a. Lack of adequate legal aid systems

Although the 1999 Constitution of the Federal Republic of Nigeria and other laws make provisions for free legal services or financial assistance for the poor,³⁰ there is a consensus that the existing legal aid system in the country is grossly underfunded and consequently unable to cope with the demand for legal aid services in the country.³¹ Thus, the great majority of the poor and disadvantaged

²⁸ See Falana, F.(2004), *Access to Justice, Bill of Rights and Independence of the Judiciary* Constitutional Essays. Nigeria Beyond 1999. Stabilizing the Polity through Constitutional Re Engineering, In Honour of Bola Ige. Gidado, M. et al, (eds.), Enugu, Chenglo Ltd., p 22

²⁹ Gidado, M. M., *The Effect of Corruption in the Administration of Justice*, Constitutional Essays, *ibid*, 226

³⁰ See Sections 36(6) b and 46(4) b and the Legal Aid Act 2011

³¹ Bowen O. A., *An Operational Assessment of the Legal Aid Scheme*, Omotala and Adeogun, (eds), Law and Development, Lagos, Unilag. Press, p.259; See also Akinseye-George Y., (1993) *The Dilemma of Legal Aid in the Protection of Human Rights in Nigeria*, JHRLP, Vol. 3 p. 102-104.

people have no means of accessing the formal justice systems or of enjoying the human rights provisions of the Constitution and International instruments which are meant to protect them. The Legal Aid Council of Nigeria (LACON) has experienced increasing decline in its funding over the years.³²

According to McQuoid-Mason, legal aid may be simply defined as the gratuitous provision of legal assistance to persons who cannot afford to employ the services of legal practitioners. It is the provision of free and alternative legal services to persons who by reason of their disposal income or circumstances cannot afford legal services.³³ According to Banire³⁴, legal aid entails the provision of free or subsidised legal services to the indigent and the under privileged litigants.

The above definitions of legal aid emphasises the essence of legal aid which is the provision of legal services to persons who, by reason of little or no income, cannot afford a legal practitioner of their own. The availability of legal aid should promote the notion that fairness requires that every person regardless of economic condition is entitled to the protection of law.³⁵

The idea or philosophy behind legal aid is that the right to a fair trial and justice should not depend on how much money a person has or his connections, but should be available in civil and criminal proceedings to all persons equally for there to be peace, harmony

³² In 2003, the Council estimated that it would require a sum of N257.2 Million Naira for the discharge of its functions. Only N151.8 million Naira was approved but by the end of the financial year, the Council had received only N141.3 Million Naira. Similarly in 2004, the amount appropriated to the Council was further reduced to N115.9 Million Naira when the Council asked for N336.6 Million Naira. Thus notwithstanding the declining value of the Naira and increasing demand for its services, the Council has had to cope with declining resources over the years.

³³ McQuoid-Mason D. J., *op. cit.* p. 1

³⁴ Banire M. A., *op. cit.*, p. 88

³⁵ Ladan M. T., *op. cit.*, pp. 51-56

and happiness in any society.³⁶ In support of this philosophy the International Commission on Jurist at its conference on the Rule of Law in a free society held in Delhi in 1959 resolved that:

Equal access to law for the rich and poor alike is essential to the maintenance of the rule of law. It is therefore essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation, who are not able to pay for it.³⁷

The nature of legal representation or assistance may depend on the peculiar circumstances of the person seeking legal representation and the stage at which legal assistance or representation is sought. However legal aid can be in the form of offering legal opinion or primary legal advice. Advice on how to prevent legal problems is one of the most important services a lawyer can provide.³⁸ Section 13(a) of the United Nations Basic Principles on the Role of Lawyers, 1990³⁹ provides that the duties of lawyers towards their clients shall include:

- (a) Advising and educating clients as to their legal rights and obligations and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients.
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interest. This will include the drafting of pleadings based on the facts of the case as presented by the client and the accompanying documents. This form of legal assistance is usually in consequence of the written legal opinion on the client's legal rights and the need to claim and defend the rights in court.⁴⁰

³⁶ See Malemi E, *op. cit.*, p. 9

³⁷ See the Rule of Law in a Free Society. Committee Report on the Judiciary. Legal Profession and Rule of Law, p. 14 cited in Malemi E, *op. cit.*, p. 417

³⁸ McQuoid- Mason D.J., (Gen. Ed.), *op. cit.* p. 36-37.

³⁹ See Access to Justice in Africa and Beyond: Making the Rule of Law a Reality, *op. cit.*, Appendix 17, p. 268

⁴⁰ See Nwankwo, C. K., (2008), "Clinical Legal Education and Legal Assistance in Nigeria" *Abia State University Law Journal*, Volume 10, p. 96

(c) Assisting clients before courts, tribunals or administrative authorities where appropriate.

Legal representation by lawyers take place at both the pretrial and the trial stages of criminal justice administration. The goal of representation is to assist the suspect in securing release or an expeditious trial. Where a trial is contemplated, the lawyer processes a bail application for the defendant. The trial stage also includes the presentation of appeals. Where legal clinics are involved in the delivery of legal assistance studentø clinicians assist clients in accompanying them to court and public administration offices and assisting the clients in their reviewing or recording of court records and documents.

The right to basic legal advice and assistance is on par with the right to basic health care.⁴¹ Even when legal aid is available, there may be concern about maintaining the quality of service. Whilst some Commonwealth countries have sophisticated quality control mechanism in place, much needs to be done to address this issue in many other States like Nigeria.

b. Excessive reliance on litigation and sever limitations in existing remedies provided either by law or practice.

One of the biggest challenges facing the justice delivery system in Nigeria is the congestion of cases in courts and resultant delay in the administration of justice. This is occasioned greatly by the excessive reliance on litigation as the exclusive means of obtaining remedies under the law. It appears that the predisposition and mentality of lawyers is channelled towards litigation, such that when consulted it is the first thing that comes to their mind.

⁴¹Stapleton A, *Introduction and Overview of Legal Aid in Africa, Access to Justice, op. cit*, p. 8.

The result is that all manner of cases, even frivolous ones end up in court and compete with meritorious ones for the available scarce resources. Secondly, cases that could easily have been resolved using informal and less expensive medium of dispute resolution end up in court. Thirdly, most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent. The net result of the above scenario is an increase in the court's docket, undue delay in the commencement and duration of trials and increase in the cost of litigation, all at the expense of the poor litigant.

5.2.4 PROCEDURAL ISSUES

a. Delay in the administration of justice.

Delay in the determination of cases can arise for a variety of reasons: the sheer number of cases to be processed, the limited number of courts and/or judges/magistrates, limited access to lawyers especially for those in rural areas, an inefficient court administrative system, frivolous requests for adjournment of proceedings, inability of judges and magistrates to deliver judgments on time, failure of the police or prison authorities to produce detained defendants in courts for trial and the rule that once a magistrate or judge is transferred and a new one takes over a case trial must start *de novo*.

Most of the courtrooms that are being used today were built during the colonial days. Some of them were built in such a way that they do not give room for proper ventilation. The courts were originally fitted with air conditioners and the consequence is that whenever there is power failure judges find it inconvenient to sit because of the overbearing heat and inadequate lightening in the court rooms which makes reading and writing strenuous. Cases are therefore adjourned in view of these problems. There is also the problem of inadequate court rooms to accommodate newly appointed judicial officers. No provision is made for the construction of new court rooms and rehabilitation of existing ones. In terms of place, the

distance between the litigants and the court may be considerable. In terms of time, particularly for working people in urban areas, the courts are inaccessible because they sit during office hours. The effect is that justice is brought farther to the citizens in the courts.

Judicial officers also have to contend with unusual number of cases each day on the cause list. It is not unusual for a judge to have as many as forty cases or more listed on a cause a day. The judge can only treat some of the cases while the other ones are adjourned and this leads to further case congestion.

There is also the problem of inadequate working tools which slows down the determination of cases. Judicial officers still write in long hand, and there is generally little or no computerisation of processes. Appointment of judicial officers is still a matter of concern. Many lazy, inept, unskilled, incompetent persons are appointed judges.

The problem is that today it has almost become an acceptable fact in Nigeria that cases must last several years in court before they are concluded. Judicial determination of disputes take such a long time that in some cases both the witnesses and the litigants die before a case is finally determined. Such delays not only erode public confidence in the judicial process but also undermine the very existence of the courts. This is despite the provisions of section 36(1) and (4) of the Constitution which envisages the right to fair hearing within a reasonable time.⁴²

⁴² See the case of *Gozie Okeke v The State* (*Supra*) where the Supreme Court held that the word reasonable in its ordinary meaning means moderate, tolerable, or not excessive

b. Formalistic legal procedures and undue reliance on technicalities

The law and the rules of evidence and procedure practiced in the formal courts are often incomprehensible or misunderstood by many people. Further, cases are heard in a language that is foreign to many. Law is an inherently technical subject and this technicality is manifested in the various rules and procedure used by courts. For a litigant to be able to approach the courts no matter how well educated he may be, he has to retain the services of a legal practitioner who will initiate the appropriate action on his behalf.⁴³ The situation is certainly worse for an illiterate Nigerian, and when one realises that a vast majority of Nigerians are illiterate, then the actual picture can better be imagined.

Furthermore, the use of *locus standi* could create a formidable obstacle to access to justice and the protection of human rights. *Locus standi* was defined in the case of *Alhaji Adetoro Lawal v. Bello Salami & Anor*⁴⁴ as the right of a party to an action to be heard in a litigation before a court of law or tribunal or the legal capacity of instituting, initiating or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance. For a person to have *locus standi* in an action he must be able to show his interest in the matter; and in relation to human rights that his/her civil rights and obligations have been or are in danger of being infringed. The fact that such a person may not succeed in an action does not have anything to do with whether or not he has standing to bring an action.⁴⁵ Even though that the courts have taken the position that it is better to allow a party to go to court and be heard than to refuse him access to the courts in order to promote respect for the rule of law,⁴⁶ it is essential that before seeking redress in court, a plaintiff must show

⁴³ Okogbule, N. S., *op. cit.*, p. 102

⁴⁴ [2002] 2 N W L R (Pt. 752) 657

⁴⁵ See the case of *A G Akwa Ibom State v Essien* [2004] 7 N W L R (pt. 872) 288

⁴⁶ See *Senator Abraham Adesanya v. President of the Federal Republic of Nigeria* (1981) 2 NCLR 358

that he has sufficient interest in the subject matter of the suit. However, it is in the determination of the term sufficient interest that the courts have given a number of decisions, some of which have actually operated against access to justice in Nigeria⁴⁷. The case of *Thomas v Olufosoye*⁴⁸ is a case in point wherein the Supreme Court took the conservative approach which had the effect of limiting access to justice in Nigeria. The courts have however begun to adopt a more liberal approach to the issue of *locus standi*.⁴⁹

There is also the issue of pre-action notice which acts as a clog in the wheels of justice⁵⁰ and the issue of ouster clauses. A pre-action notice is a notice normally required by statute but at times also by contract to be given by a prospective plaintiff to a prospective defendant informing or intimating the defendant in respect of violation of plaintiff's right by the defendant.

5.2.5 INSTITUTIONAL PROBLEMS

a. Lack of independence of the judiciary.

There is the problem of appointments and removal of judges which are influenced by the Government, which do not gain the public confidence in the judiciary and its impartiality. Others include the issues of tenure, funding and immunity. Even though the present Constitution has made some improvements on the provisions of the 1979 Constitution there is still the problem of

⁴⁷See the case of *Attorney General v Hassan* [1985] 12 N W L R 483 and *Fawehinmi v Akilu* (1984) S C 43.

⁴⁸ [1985] N W L R (pt. 18) 669.

⁴⁹ See Fundamental Rights (Enforcement) Procedure Rules that seem to whittle down the rigidity of judicial decisions on *locus standi* in relation to fundamental rights issues. See the case of *Owodunmi v Registered Trustees of the Celestial Church of Christ and 3 Ors* (2000) 79 L R C N 2406 and the Fundamental Rights (Enforcement Procedure) Rules, 2009.

⁵⁰ See for instance section 12(1) of the Nigerian National Petroleum Act Cap. N123 Laws of the Federation of Nigeria 2004

security of tenure, remuneration, retirement benefits and pension rights, control of funds and staff by the judiciary, the polarisation and politicisation of the Nigerian judiciary especially when the courts are dealing with election matters. and the judiciary's lack of independent machinery for the enforcement of its decision⁵¹.

b. Police

On the part of the police, prolonged investigation by the police retards access to justice. Where bail is granted by the court and at the police stations, the Police make the release of suspects cumbersome. Justice is also delayed when the Police fail to send case files in their possession to the Office of the Director of Public Prosecutions for advice after the conclusion of investigation. Most of the time cases are delayed because of the non-attendance of vital prosecution witnesses and the investigating police officer who would have been transferred to a distant area. It is not unusual for the Police to fail to bring suspects to court due to the non-availability of transportation to convey them to court. Other logistic problems include communication equipment, scientific aid and accommodation. There is also the problem of poor conditions of service and poor remuneration of members of the police force.

c. Executive lawlessness and enforcement of judgments

Executive lawlessness in Nigeria has militated against the rule of law and access to justice. There are examples of disobedience of court orders by the government especially during the dark days of military rule in the country. Kayode Eso as he then was cautioned the executive on disobedience of court orders in the case of *Military Administrator of Lagos State v. Odumegu Ojukwu*⁵² in the following words:

⁵¹ See Ogbu, O. N., *op. cit.*, p. 85

⁵² (1986) 1 All N LR 1.

The essence of the rule of law is that it should never operate under the rule of force or fear. To use force to effect an act and while under the marshal of that force seek the court's equity is an attempt to infuse timidity into the courts and operate a sabotage of the cherished rule of law. It must never be. This is further affected by weak enforcement of laws and implementation of orders and decrees.

The police and other law enforcement agencies are in the habit of detaining people for long periods without trial in spite of the existence of the fundamental human rights provisions in the Constitution. The officials of the department of customs and excise are always in the habit of raiding markets with guns, horse whips and tear gas for the seizure of banned imported items when it was due to their inability to check the menace of smuggling that led the presence of the banned imported items in the first place.⁵³ There are cases of extra-judicial killings by law enforcement agencies. The impunity of disobedience of court orders is still ongoing and only defendants that have money or clout are able to follow through with the enforcement of court orders and judgments.

5.2.6 GEOGRAPHICAL FACTORS

a. Court location and spread

Many courts are located in urban areas. There are few lawyers located in rural areas. Secondly people who live in the rural areas prefer to have recourse to the traditional or customary fora and therefore the lawyer only plays a role in the state justice system.

⁵³ See Aduba, N, (1999), *The Protection of Human Rights in Nigeria*, Text for Human Rights Teaching In Schools, CRP, p.126.

b. Other Barriers

Other barriers to access to justice include gender bias, the inadequacies of existing law which effectively fail to protect women, children, poor and other disadvantaged people including those with disabilities and low levels of literacy. There is also the lack of *de facto* protection especially for women, children and men in prisons or centres of detention. Another barrier is the lack of adequate information about what is supposed to exist under the law, what prevails in practice and limited popular knowledge of rights and public participation in reform programmes. Finally, there is the problem of excessive number of laws.⁵⁴

One fundamental right of freedom of any individual is the right to access to justice and the courts. Equal access to justice is the most inspiring ideal of our society. It is one of the ends to which our entire system exists. The impediments act as a clog in the realisation of these fundamental rights.

5.3 OPERATION OF LEGAL AID IN NIGERIA

In Nigeria, government controlled legal aid scheme is provided for in the Legal Aid Act⁵⁵. This is the main statute on legal aid in Nigeria. Other relevant statutes to legal aid include

1. The Constitution
2. The Criminal Procedure Act
3. The Criminal Procedure Code
4. The Supreme Court Act
5. The Court of Appeal Act
6. The High Court Civil Procedure Rules
7. State laws establishing legal aid agencies.

The Explanatory Memorandum to the Legal Aid Act states as follows:

⁵⁴See Access to Justice Practice Note. UNDP Executive Summary 9/3/2004, p.4

⁵⁵ 2011

This Act repeals the Legal Aid Act Cap. L9, Laws of the Federation of Nigeria, 2004, enact the Legal Aid Act, 2011 in line with international standards, provide for the establishment of legal aid and access to justice fund into which financial assistance would be made available to the Council on behalf of the indigent citizens to prosecute their claims in accordance with the Constitution and further to empower the existing Legal Aid Council to be responsible for the operation of a scheme for the grant of legal aid and access to justice in certain matters or proceedings to persons with inadequate resources in accordance with the provision of this Act.

The explanatory memorandum or preamble seems to equate inadequate means with income deficiency which is to a large extent erroneous.⁵⁶ Section 1 of the Act establishes the Legal Aid Council which is charged with the responsibility of regulating legal aid in Nigeria. The Council is an agency of the federal government. It was first established by the Legal Aid Council Decree.⁵⁷ It is a body corporate with perpetual succession to offer legal aid in certain proceedings provided by the Act. The Council shall comprise of the Governing Board which is made up of a Chairman and members, the Director-General of the Council and supporting staff.⁵⁸ The Governing Board is headed by a Chairman and representatives with representatives from several agencies as members.⁵⁹ The functions of the Governing Board shall include the establishment of broad policies and strategic plans of the Council in accordance with the provisions of the Act.⁶⁰ The day to day running of the affairs of the Council is the responsibility of the Director-General who is the Chief Executive Officer.⁶¹ The Council is empowered to established a zonal office in each of the geo-political zones to be headed by a zonal officer who shall be a

⁵⁶ See Banire, M. A., *op. cit.* 96

⁵⁷ Decree No. 56 of 1976

⁵⁸ Section 1(4) a-c

⁵⁹ See Section 2(1).

⁶⁰ Section 3

⁶¹ See Section 4(1).

lawyer and responsible for the coordination of State offices and their activities.⁶² There shall be established one office in each state of the Federation to be headed by an officer who shall be responsible for the provision of services in the State and reports to the zonal officer within the jurisdiction of the State.⁶³ Each State office of the Council shall operate three legal service units namely:

1. Criminal Defence Unit.
2. Civil Litigant Unit.
3. Community Legal Services Unit.

The Council is the only federal institution empowered by law and charged with the onerous responsibility of providing legal representation to indigent Nigerians whose income when taken individually do not exceed the national minimum wage and as well, others whose individual incomes are above the minimum wage but cannot afford the services of private legal practitioners of their own choice.⁶⁴

The Legal Aid Act is an Act with 25 sections. Some of the sections are broken into subsections. The Act has two schedules. The First Schedule deals with supplementary provisions relating to the Council such as tenure of office, proceedings of the Council and Committees, while the Second Schedule provides for the proceedings in respect of which legal aid may be given.

A. Scope of legal services and offences covered by the Legal Aid Act

According to section 8(1) of the Act, the grant of legal aid, advice and access to justice shall be provided by the Council in three broad areas, namely, criminal defence service, advice and assistance in civil matters including legal representative in court

⁶² Section 6(2)

⁶³ Section 6(4)

⁶⁴ See section 10(1) and (2)

and community legal services subject to merits and indigence tests for the parties. Section 8(5) of the Act provides for the type of legal aid to be afforded the applicant which shall consist of:

- (a) The assistance of a legal practitioner including all such assistance as is usually given by a legal practitioner in the steps preliminary or incidental to any proceedings;
- (b) Representation by a legal practitioner before any court; and
- (c) Such additional aid including advice in civil causes and matters as may be prescribed.

The scope of legal aid available under the Act is provided for in section 8(2) which states that under the criminal defence service the proceedings in connection with which legal aid may be granted shall be in respect of criminal and civil matters specified in the second schedule to the Act, access to such advice, assistance and representation as the interest of justice requires and no legal aid shall be granted in respect of proceedings not specified. The second schedule provides for the categories of proceedings in respect of which legal aid may be given which are as follows:

Proceedings in a court or tribunal whether at first instance or on appeal wholly or partly in respect of crimes of the following description or as near to those description as may be respectively in any criminal code or penal code that is to say-

1. Murder of any degree or culpable homicide punishable with death;
2. Manslaughter or culpable homicide not punishable with death
3. Maliciously or wilfully wounding or inflicting grievous bodily harm or grievous hurt.
4. Assault occasioning actual bodily harm or criminal force occasioning actual bodily hurt.
5. Common assault.
6. Affray.
7. Stealing.
8. Rape.

9. Armed robbery

The service also covers aiding and abetting or counselling or procuring the commission of, or being an accessory before or after the fact to or attempting or conspiring to commit any of the offences listed above in the schedule. The Council is empowered to undertake civil claims in respect of accidents including employee's compensation claim (under the Employee's Compensation Act,⁶⁵ for damages for breach of fundamental rights as guaranteed under Chapter Four of the Constitution of the Federal Republic of Nigeria⁶⁶ and civil claims arising from criminal activities against persons who are qualified for legal aid under this Act.

Section 9(a) of the Act establishes a fund for the Council known as the Legal Aid General Fund for the activities of the Council. The sources of the fund under the provision are the Federal and State Government subventions as appropriated annually by the National Assembly pursuant to section 46 of the Constitution. The Legal Aid General Fund consists of the Legal Aid Fund and Access to Justice Fund.⁶⁷ The Council can also realise funds through contributions in accordance with the Act and gifts from philanthropic persons and bodies. Such gifts acceptable upon trust must not be on condition that will infringe the realisation of the objectives of the Act or inconsistent with the functions of the Council. For the purposes of accountability, the account of the Council is subject to audit each financial year by auditors appointed by the Board⁶⁸

⁶⁵ Act No. 13 of 2010

⁶⁶ See Section 46(4)b of the 1999 Constitution.

⁶⁷ See sections 9(a) and 23(1) c

⁶⁸ See Sections 12 and 13.

B. Eligibility of applicants for legal aid and activities of lawyers, law clinics and paralegals

Section 10(1) of the Act provides that legal aid shall only be granted to a person whose income does not exceed the national minimum wage and those whose earning exceeds the national minimum wage but may in exceptional circumstances be granted legal aid and also on contributory basis.⁶⁹ What this means is that the Board has the right to ask an applicant for legal aid to make financial contribution in respect of the funding for the legal assistance that is being given to him.⁷⁰ The national minimum wage is fixed at N18, 000.00 (Eighteen Thousand Naira) per month.

Where cost is awarded against a party to a suit to whom legal aid is given, the Council shall not in any way be liable to pay such cost.⁷¹ In the ascertainment of the annual income of an applicant for legal aid, the Council is required to take into account the personal income and the personal and real property of the applicant in order to determine his qualification for legal aid.⁷² To assist the Council in the rendering of legal aid, the Council is empowered to maintain a list of Panels of legal practitioners willing to act for persons receiving legal aid for different purposes, for different courts and for different districts in the country.⁷³ Any legal practitioner may apply and the remuneration shall be in accordance with the prescribed manner. However a legal practitioner engaged for a legal service is forbidden from collecting any money from the beneficiary. Also legal practitioners for the time being serving in the National Youth Service Corps (NYSC) may offer their services to the Council free of charge without payment except stipend and travelling allowance.⁷⁴

⁶⁹ See sections 10(2), (3) and (4)

⁷⁰ See Section 9(2) (3).

⁷¹ See Section 10(4).

⁷² See Section 11(1).

⁷³ See Section 14(1).

⁷⁴ See Section 16.

Participants under the Legal Aid Council scheme include salaried lawyers who are members of staff employed by the Council. They are civil servants under the Federal Government of Nigeria and are paid normal monthly salaries and are also entitled to such staff welfare packages as are available in the civil service. The Council is also empowered to maintain a register of non-governmental organisations, law clinics and may grant licences to persons who have undergone the services of such course in paralegal services to render such services in appropriate situations.⁷⁵ Furthermore the Council mandatorily requires legal practitioners who institutes or conducts *pro bono* cases on behalf of persons entitled to legal aid to register such cases with the Council for record keeping and monitoring of such cases by the Council. Legal practitioners who apply for the position of Senior Advocates of Nigeria are now required to do at least three *pro bono* cases in the legal year immediately preceding the application.⁷⁶

Section 19 of the Act provides for prison monitoring and review of cases of awaiting trial inmates by the Council. Police officers and the Courts are also under obligation to inform suspects of their entitlement to legal assistance. The Council and the lawyers designated by it shall be entitled to have access and be present during interrogation of suspects.

Section 20 of the Act makes provision for the prohibition of the disclosure of any information furnished by any person to the Council. It is a punishable offence to do so except with the consent of the applicant for legal aid. It is equally an offence for a person receiving legal aid to furnish false information to the Council.⁷⁷

The Council is required to make an annual report with respect to its operations, transactions and statement of accounts to the Attorney General of the Federation and the Governing Board is empowered to make regulations generally for better carrying out

⁷⁵ See section 17(1) and (3).

⁷⁶ Section 18(1) and (2)

⁷⁷ See Section 21

of the purposes of the Council.⁷⁸ The First Schedule to the Act makes provision for the tenure of office, committees and proceedings of the Governing Board.

The Legal Aid Regulations is a subsidiary legislation which makes regulations with respect to circumstances where legal aid may be given, application for legal aid, eligibility for legal aid, the determination of the means and needs of an applicant for legal aid, the valuation of the asset of an applicant, contribution of money to the Council by an applicant, choice of a legal practitioner by an applicant from the list of legal practitioners maintained by the Council, referral of monetary claims to the Council by legal practitioners, rendering services to the Council in respect of applicants benefiting from legal aid and receipt of monies by legal practitioners. The Regulations further provide for the termination of legal assistance, notice of termination of legal aid, duties of legal practitioners, payment of legal practitioners and terms and conditions of matters assigned.⁷⁹

C. Procedure for application for legal aid

An eligible applicant for legal aid has to obtain a form⁸⁰ from the relevant legal aid council office or court, or prison as the case may be and complete and return the form to the legal aid office for consideration. If the Council is satisfied that the applicant cannot afford the services of a legal practitioner and that his annual income is less than the national minimum wage which is N18,000.00, legal aid is granted to him. According to Malemi⁸¹, where the applicant is a person who has been arraigned or standing trial for an offence or civil proceedings, then the presiding Judge or Magistrate has to decide whether or not to grant legal aid, and to contract a legal practitioner who is willing and ready to provide

⁷⁸ See Sections 22 and 23(1)-(5).

⁷⁹ Malemi Ese, *op. cit.*, pp. 430-431.

⁸⁰ Section 2(1) and (2) of the Legal Aid Regulations.

⁸¹ Malemi, *op. cit.*, p. 431.

the requisite legal aid on behalf of the Council which will make the necessary payment

5.4 MEANS OF ENHANCING ACCESS TO JUSTICE

The following recommendations are suggested for the enhancement of access to justice and legal aid.

1. The time has come for greater recognition of traditional and informal non-state justice systems especially in rural areas. There are however serious problems associated with the non-state traditional justice mechanism like local politics, infliction of physical punishment (sharia law as practiced in the Northern states of Nigeria and the Sudan) which endorses corporal punishment especially as concerns young offenders. Sentences of death by stoning passed by the lower courts have also achieved notoriety in the international media, corrupt practices and a tendency to maintain the status quo. In view of the above, NGOs and Faith groups have developed new mechanisms to assist people in resolving their disputes. Customary law has a dynamic presence in most African countries handling most of the work that would otherwise inundate the courts. By recognising its role, funds will be reserved for legal aid in the formal courts since lawyers are not needed in such conciliatory forum.

2. In addition, even within state justice systems, non-lawyers can successfully perform much of the work traditionally performed by lawyers alone. The role of non-lawyers like paralegals and law students who are equipped with the knowledge of law and procedure and trained in practical skills cannot be over-emphasised. The role of paralegals has long been recognised in the United Kingdom, South Africa, Zimbabwe, Sierra Leone and Malawi and can perform similar roles in Nigeria. Several highly innovative and cost effective legal aid mechanisms do not require the expertise of a lawyer but demonstrate that properly trained non-lawyers can provide the appropriate advice and assistance to an enormous number of citizens on a range of issues, whether in the

village or in the police station that is at interview, in court at first appearance or on production in prison. They are predicated on an understanding that there are multiple solutions to community conflict resolution which will enable greater access to justice.

The use of properly trained paralegals in providing legal assistance will help to decongest the prisons which are full not of dangerous people (though there may be some) but of poor people, the majority of whom have not committed the types of offences that require their removal from society. According to Adeyemi⁸², people who are sent to imprisonment in default of payment of fines can be as much as 16 per cent of the total prison population.

3. Government has a responsibility to ensure adequate legal assistance at all stages of the proceedings in capital cases and in cases where the interests of justice so require providing a lawyer of experience and competence commensurate with the offence assigned to them in order to provide effective legal assistance.

4. Considering the fact that many countries cannot afford or provide lawyer based schemes, it is time to broaden the definition of legal aid and open it up to a range of services. These services taken together would produce the user with a choice of justice delivery mechanisms and for those in conflict with the criminal law, appropriate assistance at all stages of the proceedings that is at interview in the police station, to remand prisoners and to those on their first appearance in court.

5. Legal aid should be taken more seriously in the political agenda of governments despite being faced with ostensibly insurmountable security crises like public health threat and socio-economic challenges. Legal aid should be popular and politically

⁸² Adeyemi, A. A, (1994) "Personal Reparations in Africa: Nigeria and Gambia", Zvekiv ed., in *Alternatives to Imprisonment in Comparative Perspective*, 53, 66, cited in *Access to Justice in Africa and Beyond, op. cit.*, p. 8.

glamorous. There is the need for awareness of individual rights and the willingness or ability to vindicate them. In many African societies, the campaign for the implementation of truly effective legal aid must acknowledge the need for a broadly based civic education program which will involve a variety of strategies ranging from special sub courses as part of the ordinary school curriculum to street law projects and in giving community based programs. This will inevitably lead to the need to generally improve the quality of life through enforcement of entitlements which will become real for most especially women, refugees, normally displaced persons, the homeless, street children, child combatants, Aids sufferers, orphans, child prostitutes and all other defenceless victims who largely fend for themselves in this harsh and unrelenting continent of ours.

6. There is therefore the need for African countries to enhance *pro bono* provision of legal aid by lawyers, guarantee sustainability of legal aid and encourage legal literacy.

7. In Nigeria it is recommended that the operations of the Legal Aid Council be made more pro-active to meet the yearnings and aspirations of Nigerians through creating greater access to justice. This will necessarily entail the widening of the scope of the operations in terms of increase in the level and category of potential beneficiaries from the scheme, the subject matter coverage coupled with aggressive public enlightenment exercise. Offences such as treason, treachery, robbery and obtaining by false pretences should be included as a category of offences that can receive legal aid. This is because these offences constitute the source of arrests and convictions in the country. Furthermore, if common assault can be covered, then treasonable felony which, in fact, is attempted treason and robbery should also be covered. Legal aid should also be made available in civil matters. Nigerian law graduates in the National Youth Service Corps program could be seconded to the Legal Aid Council to assist as public defenders taking into consideration their experience and the seriousness of the offence involved. In South Africa candidate attorneys with the

necessary legal qualifications are allowed to obtain practical experience by undertaking community service rather than serving articles in an attorney's office.

8. To minimise the problem of funding and at the same time increase the scope of those that will benefit from the scheme. It is recommended that persons receiving legal aid should make such contributions to the cost of legal services as they are deemed able to afford having regard to their resources instead of restricting the grant of legal aid to persons whose income does not exceed the national minimum wage.

9. Those eligible for legal aid should have a free choice of lawyers and the services provided should be of the same quality as those available for fee paying clients. Lawyers offering legal services under the legal aid scheme must remain professionally independent and should be fairly and reasonably remunerated for work done under the legal aid scheme.

10. In the delivery of legal services, it is recommended that the concept of University legal clinics be adopted to complement the other models of delivery of legal services. Happily, section 17 (1) of the Legal Aid Act of 2011 provides that the Council shall maintain a register of non-governmental organisations and law clinics that are engaged in the provision of legal aid or assistance to persons who are entitled to legal aid under the Act. Most law clinics either require law students to work in a University law clinic or assign the students to an outside partnership organisation where they can provide legal services under supervision.

12. It is further recommended that there should be constant public awareness to solve the problem of massive lack of knowledge of the law. The purpose of the Community Legal Service Unit of the Legal Aid Council in the new Legal Aid Act which includes the provision of general information about the law and legal system and the availability of legal services is laudable but lack the means for implementation.

In view of the above problem the National Assembly should develop adequate mechanisms and oversight functions on how long it should take any Ministry or Institution to disseminate information on any laws passed in the country. Efforts should also be made to increase awareness of and resort to alternative methods of dispute resolution. These mechanisms are more cost effective and in tandem with the traditional method of dispute resolution which had served African countries so well before the imposition of the received English system of adjudication.

13. There should also be improvement in the socio-economic and political conditions of the masses. Access to justice will be a mirage to the poor who cannot afford legal services if they are not adequately empowered. It is also recommended that there should be reforms in the institutions involved in the administration of justice.

14. For the judiciary, new courtrooms should be built while old ones should be rehabilitated. Government should appoint new judicial officers with a view to minimising congestion of cases in court. There is need to accelerate the administration of justice by making provision for electronic equipment to record court proceedings and make provision for the personnel who will man the equipment. The remuneration of judicial officers should be made attractive to attract the right calibre of people.

15. On the part of the police, the remuneration of policemen should be attractive while a trust fund should be set up to cater for the children of policemen who die in the course of duty. Bad eggs in the force should be relieved of their duties to serve as deterrent to others.

16. For the prisons, new prisons should be built while existing ones should be rehabilitated in order to reduce drastically the ratio of inmates to a room. It is also recommended that High Courts and Magistrate Courts should be built inside the prisons to enhance speedy dispensation of justice, reduce overnight cases, save time and decongest the courts.

17. Lawyers in the Ministry of Justice and the Legal Aid Council should be adequately remunerated and provided with good offices and residential accommodation and working tools like vehicles to convey them to court.

CHAPTER 6

Role of Law Clinics in Prison and Pre-trial Detention

OUTCOMES

Explain and discuss the scope and role of university based law clinics in prison and pre-trial detention.

6.1 INTRODUCTION

One recurrent concern of stakeholders in criminal justice administration is the fate of the indigent and other underrepresented groups *vis a vis* the claim of guarantee of equality before the law in particular and access to justice in general. The problem of access to justice for this group appears to create genuine doubt on the concept of justice itself, and every contribution in addressing this socio-legal problem is appreciated. It is no longer in doubt that law clinics have become recognized as capable of playing some appreciable part in assisting the indigent and underrepresented subject with obvious limitations. The part that could be played by university based law clinics is the focus of this chapter.

From this narrow perspective, the role of law clinics is in enhancing access to justice by providing supplemental legal aid and assistance in the form of paralegal services and support, including limited representation, legal counselling and education. The distinction in the forms of legal service becomes apparent when it is realized that the needs of prisoners and pre-trial detainees in access to justice extends beyond legal representation in court, which is the exclusive preserve of lawyers in Nigeria. It extends to paralegal services which could be rendered by non-

lawyers. Paralegal services by students are free and driven by passion to help.

6.2 THE ROLE OF LAW CLINICS IN PRISON PRE TRIAL DETENTION

The role of the law clinics in Prison Pre-trial Detention matters is best looked at from two perspectives best expressed by relevant questions. First, what is the concern or problems that the Prisons/Pre-trial detention clinics are designed to solve? Secondly, what is the purpose, benefit or objective of the Prisons/Pre-trial detention clinics?

The concern or problem the clinics are designed to achieve will naturally include, the observed limited and or absence of access to justice to the indigent or underrepresented and marginalized prisoners and pre-trial detainees in the Prisons. The primary purpose, or objective of the Prison Pre-trial detainees law clinics is the provision of access to justice for the unrepresented prison pre-trial detainees.

In any determination of his/her rights and obligations, every citizen, particularly those not trained in law, usually requires legal assistance generally provided by lawyers. This is more so whenever the rights to basic freedoms and liberties are threatened. Unfortunately, for economic reasons, it is not everybody that can afford to pay for the services of a lawyer. The indigent and other underrepresented persons, especially those in the Prisons are significantly affected. The National Human Rights Commission in 2008 had estimated the awaiting trial prisoners as constituting a national average of 64.7% of total prison population, with the Prisons in the South recording as much as 77% while over 20 Prisons recorded up to 80% of that average. The Commission described this situation as reflecting a virtual collapse of criminal

justice administration in Nigeria¹. As at July 6, 2011 the Nigerian prison had over 48,000 prisoners in custody but only about 14,000 of them were convicts², accounting for 22.6%. Most of the awaiting trial prisoners are incarcerated for minor offences³. A National Working Group on Prison Reforms and Decongestion⁴ had earlier audited and found that 10.5% of convicted prisoners were in prison for minor offences⁵. The reason for the number is not far-fetched as prison statistics also shows the disturbing percentage of persons in prisons who are not represented by counsel. According to the National Human Rights Commission Prisons Audit;

Legal representation was generally low in all Prisons visited. There were many persons awaiting trial who did not have legal representation¹ some prisons did not benefit from the Federal Government's Prison decongestion exercise² it was also observed that the ¹ decongestion exercise, especially assignment of cases to private law firms, concentrated on prisons in urban centres⁶.

As a policy there is limited legal aid provided by government through the Legal Aid Council of Nigeria; there is also the prisons

¹ See 2007-2008 National Prisons Audit, National Human Rights Commission, 2008, p. 49; see further at p.208 that in about 23 of the Prisons audited, over 80% of the Prisoners are awaiting trial.

²Ojo, J., *The Move to Collapse Nigerian Prison System*, Thisday Newspapers (08 Nov 2011):<http://www.thisdaylive.com/articles/the-move-to-collapse-nigerian-prison-system/102284/>, last accessed 16 January 2012.

³See, Atoki, D, *The Current Situation in Pre-Trial Detention in Africa: Challenges and Opportunities for Reform* (23-24 May 2000), Paper presented at the All Africa Law Clinics Conference on Pre-Trial and Criminal Justice, Abuja.

⁴ Set up by the Olusegun Obasanjo on 10 February 2004;

⁵ That is, offences with sentences of six months and less or with option of fine; See Ladan, M.T., (13-14 December 2010), *Penal Reform and Introduction of Non-custodial sentencing to achieve a fairer Criminal Justice System in Nigeria*, paper presented at a 3 day National Summit on Penal Reform and Decongestion of Prisons, Abuja, 16.

⁶ 2007-2008 National Prisons Audit, op cit, pp.14-15

decongestion exercise of the Federal Ministry of Justice. Again, there are reports of the work of non-governmental and professional organizations working to assist the indigent and underrepresented group⁷. The National Human Rights Commission Prisons Audit considered the issue of legal representation in the South-West Zone, unarguably the most informed zone in Nigeria, and observed that:

The legal representation available to the inmates (sic) ranged from personal lawyers to lawyers from the Legal Aid Council and other voluntary organizations offering pro-bono legal services like FIDA, NBA, NGOs, NHRC, etc. In cases where there was legal representation, the number is so insignificant compared to the lock up. For example, in Kirikiri maximum where the lock up was 413, the inmates with legal representation were 194. In Agodi with a lock up of 630, those with legal representation were 392. These had the highest number of inmates with legal representation in the zone.⁸

In the North Central Zone, the report observed as follows:

Most of the Prison inmates (sic) had no legal representation in respect of the allegations for which they are awaiting trial. The reasons for this include lack of funds to hire the services of lawyers and the low level of pro bono legal services.⁹

The Audit concluded that:

most of the inmates (sic) awaiting trials in prisons across the country had no legal representation and this has contributed to the large number of awaiting trial inmates in cells. The legal representation being carried out by the

⁷ See Ladan, M.T., *op cit*, 16

⁸ 2007-2008 National Prisons Audit, *op cit*, 176

⁹ *ibid*, p. 170

Ministry of Justice seems not to be addressing the issue of awaiting trial inmates¹⁰.

The truth is that the interventions have made no impact at all. Indeed, we must admit the failure of legal aid in Nigeria. A lot of work needs to be done.

So, the role of the Prison Pre-trial detainees law clinic is to supplement existing legal aid and assistance to unrepresented prisoners and pre-trial detainees in order to increase access to justice for this group. It is appreciated that the supplemental legal aid to the underrepresented is highly limited by the capacity and capability of the students who have no right to be heard in representation before the courts or other tribunals where the issue of rights of prisoners and pre-trial detainees come up. In all other respects the clinicians can really attend to the prisoners-to ascertain their legal needs, counsel, receive information, monitor, carry on administrative processes and follow-up court cases, as well as make representations in non-court trial situations. The extent to which they could do all these and more will depend on the opportunities available to the students. Therefore, the role of the Prison Pre-trial detainees law clinics comprises the task in terms of time, money and skills available to the student-clinicians and the institution to achieve the objective and deliver the purpose outlined.

6.3 SPECIFIC INTERVENTIONS AND ACTIVITIES OF PRISON PRE-TRIAL DETAINEES LAW CLINICS

In specific details, the role of law clinics in prison pre-trial detention translates to the specific interventions of the clinics on behalf of prisoners and pre-trial detainees and in furtherance of the objective of supplementing existing legal aid and assistance to unrepresented prisoners and pre-trial detainees in order to increase access to justice.

¹⁰ *ibid*, p. 211

6.3.1 INTERVENTION THROUGH PRISON VISITS

The experience of existing legal clinics¹¹ in pilot prisons services has shown that best intervention approach will naturally involve prison visits since the subjects of intervention are confined to the prisons. The Prisoners yearn for the opportunity of such visits to, at least to express their feelings. So, the visit and opportunity offered by an interviewing session provide critical intervention in the criminal justice process-to a right to present and receive consideration of one's needs, desire or choice. This right is seldom available to so many indigent persons languishing in the Nigerian Prisons. It took the first ABSU Prisons visits in 2008 for the ABSU Law Clinic to appreciate that the under-estimated capacity of student-clinicians to render minimal service to Prisoners actually provided little hope to many prisoners who hitherto had no such opportunity. They continuously asked for more, and even the Prison officials formally requested for more of such visits¹² and extension of the service to other Prisons. The students were amazed that their hitherto untapped, probably under-rated skills were not available to this class of prisoners. At the prisons, the student-clinician could do so many things starting with interviewing and counseling, categorization of cases and classification of prisoners, observation and assessment of prison conditions/human rights violations, assist in jail delivery programmes, collect data on prisoners' welfare, and re-orientation/education and other assistance to released prisoners and detainees.

¹¹ For example, see ABSU Law Clinic blog:

<http://absulawclinic.blogspot.com/2009/02/pre-fieldprisons-visit-workshopabsulaw.html>, posting of Feb 15, 2009; last accessed 16 January 2012

¹² See Ntewo, C.S., "A lot still needs to be done as most of our prisons are still congested mostly by awaiting trial persons (ATP)... Obviously, it was on that note that we graciously approved the application of the Law Clinicians of Abia State University to visit prisons in Abia State so as to contribute... towards quick access to justice for the prison inmates": *The Nigerian Prisons Service – History, its Relevance and the Ethics of Visiting the Prisons*, being a paper presented at the 1st ABSU Prisons Law Clinic Pre-field visit Workshop on Tuesday, 10 February 2009.

(a) Interview and counseling

Interview and counseling of the Prisoner or Pre-Trial Detainee provide the rare opportunity for the indigent or underrepresented to: present his/her own side of the story to an unbiased, informed professional person; be listened to confidentially; test his choices; get basic information on his right of access to justice; -know his legal options; receive candid legal opinion; and make an informed decision, etc.

This intervention is critical to the ultimate objective of ensuring that the prisoner's rights under the law are enforced. It is noted that as part of the minimum international standard treatment, all prisoners, detainees and prisoners), are entitled to legal advice, and the prison authorities are obliged to provide them with reasonable facilities for gaining access to such advice and facilities for consultation¹³. Prisoners are entitled to consult on any legal matter with a legal adviser of their own choice.

On the part of the student, the interview provides the opportunity to obtain data generally, categorize the prisoners, assess the prisoners or pre-trial detainees that qualify for the clinic's free legal assistance, and identify the immediate legal and other needs of the prisoner or pre-trial detainee while proffering immediate free legal advice. This interview is also the time to identify those prisoners and pre-trial detainees that require very little assistance and those deserving more urgent assistance.

(b) Categorization of cases and classification of Prisoners

One important intervention of the prison pre-trial detainees law clinics in enhancing access to justice generally is the categorization

¹³ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18; see *Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit*, UN New York, 2006, 23 http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/1_Prison_%20System.pdf, last accessed 21 January 2012.

and classification of prisoners. Some of the common categories and classifications include:

- (i) Pre-trial cases and cases already in court with clients' names; cases not pending in court, cases with missing files, cases without legal advice from the DPP; cases on holding charges; cases of persons detained for a long period without trial; cases of persons whose cases were stalled by non-availability of investigating police officers, cases of persons whose cases were stalled by non-availability of prosecution witnesses, cases of convicted persons deserving intervention, e.g. old age, under-aged, those that cannot pay small fines, etc.
- (ii) Children/Juveniles in Prison
- (iii) Babies in prison
- (iv) Women
- (v) Mentally disabled

Categorization and classification of prisoners are very useful in determining the special needs of categories of prisoners especially and prisoners generally. For instance, where juveniles are identified, they deserve special care and attention, and must not be kept in prisons designated for adults. The same special care and attention are accorded to pregnant women, nursing mothers and mentally disabled persons. Categorization is equally useful in subsequent activities, including repeat visits, monitoring, legal assistance and referrals. Generally, categorization, classification and separation of prisoners pose serious challenge. The National Human Rights Commission Prisons Audit¹⁴ lamented that:

It was difficult to obtain records of inmates (sic) with legal representation, inmates (sic) whose case files were missing and those whose cases were stalled on account of unavailability of the Investigating Police Officer (IPO) and advice from Director of Public Prosecution (DPP). This was because of poor record keeping system in the prisons. Most records in this regard, were obtained through direct interviews

¹⁴ *op. cit.*, p. 14

The Audit further noted that:

children were found in some of the prisons. No provisions were made for children as this was not a consideration for classification and separation of inmates (sic) in the prisons. There were inmates with life threatening ailments in the prisons. Lunatics were found in some prisons. Lunatics require special care and should not be kept in the Prison where there are no facilities for their care and treatment.¹⁵

The audit concluded that:

the classification of inmate centered on male, female classification as well as convicted and awaiting trial classification. Other forms of classification centered on condemned and lifers inmates. However, in all the prisons visited, the classification of inmates did not consider the nature of offences (minor and capital offences). In Jalingo Prison inmates with life threatening ailments were separated from others.¹⁶

The categorization, classification and separation of prisoners are important components of good prisons advocacy which the law clinics can contribute to. It goes a long way in working for the Prisoners.

(c) Observation and assessment of Prison conditions/human rights violations

The Prison visit by the student also provides opportunity for an assessment of the general prison conditions which will inform opinion on compliance or otherwise of vital human rights standards. Compliance by the Prisons with the standards can be

¹⁵ *ibid*, pp. 15-16; see also *Juvenile Justice Administration in Nigeria: Report, Assessment of Field Visits to Prisons, Police cells and Juvenile Detention centres in Nigeria* April, 2003, 4, which found that "a large number of young detainees are found in prisons where they are frequently locked up with adults.

¹⁶ *ibid*, p.211

gauged by assessing the extent to which the standards required in international legal instruments are being observed in practice. Relevant standards here include those set by the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR) and the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, among other instruments. In addition to providing reports for use by relevant authorities, the students will have opportunity to reflect on the standards and hopefully the experience will guide them in the future when they take positions of authority to make changes in governance.

(d) Jail delivery advocacy with the Chief Judge

The prison pre-trial detainee law clinics participate in jail delivery visits and advocacy. Armed with comprehensive data on prisoners and pre-Trial detainees deserving assistance, and established rapport cultivated with the Chief Judge through advocacy visits, the clinics participate in Jail delivery visits¹⁷. During such visits, the Clinic presents cases for the Chief Judge's decision. Many of such cases may never have come to the attention of the Chief Judge but for the reports of the law students.

(e) Obtain data on Prisoners' welfare

Through prison visits the clinic could collect relevant data on prisoners' welfare to assist and guide the clinic, other partners or stakeholders in Prisons' work, and generally in policy formulation. Such data collected by the clinic could be useful, even if the clinic stops at this intervention level. There is no limit to what data to be collected, but issues such as congestion or otherwise of the Prison, nature of accommodation and ventilation of prison rooms, proper classification and separation of prisoners, health condition of the prisoners and the prisons itself, as well as general attitude of prison officers to the right of prisoners, etc are findings relevant to stakeholders. It is from these findings that the treatment of prisoners could be assessed and their rights protected and enforced

¹⁷ABSU Law Clinic blog, *op. cit.*

in accordance with the international minimum standard of treatment of Prisoners.

(f) Orientation and assistance to released prisoners

The clinics could play a role in getting released a prisoner or pre-trial detainee re-reconnect and integrate into the society. There is no doubt that imprisonment leads to psychological and social problems of rejection and dejection. It has been suggested that if they are rejected by the community usually leading them to commit again the crime that took them to prison in the first instance¹⁸. Those released usually will require assistance to rejoin their family members, and the Law clinics have been comfortable assisting in this regard.

6.3.2 INTERVENTION WITH STATKEHOLDERS IN THE ADMINISTRATION OF JUSTICE

(a) Contacting family

Law clinics play vital roles in contacting families of prisoners and pre-trial detainees who are confined without opportunity of connecting with families. Cases abound where families believe their children had been lost by death or other calamities when they are actually languishing in Prisons¹⁹. Again, The Law Clinic helps in contacting family, and educating them on processes of securing bail for their wards, or to provide other vital assistance in seeking access to justice.

(b) Intervention with Prison authorities

The mere fact of the prisons visit by the clinic is a necessary intervention with the prisons authority and this could go a long way in achieving for the prisoner rights enforcement or protection of some basic rights. It ensures that the Prisons authority oblige the Prisoner with his/her basic right to legal advice which is critical to

¹⁸Nwaeze, A, (ed),(2009), *Baseline and Impact Assessment of the Prisons: Decongestion and Re-entry Scheme*, (PDRS) PRAWA, Enugu.

¹⁹ *ibid*

the Prisoner enforcing other rights. It is noted that certain rights of the Prisoner and pre-trial detainee are usually overlooked in practice. For instance Rule 35 of the Standard Minimum Rules states that:

Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorised methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution. If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.

This Rule is seldom, if ever, observed in Nigeria. The Clinic could intervene in this regard just like it could do in ensuring that some other non-contentious rights are enforced. Of course, in view of the delicate but cordial relationship between the Clinic and the Prisons, which must be maintained the Clinic cannot afford to press for controversial rights of Prisoners.

Another apparently insignificant but critical right of the Prisoners, that the Clinic could enforce by mere enquiries is that provided by Article 10 of the Declaration on the Protection of All persons from Enforced Disappearance requiring that in any place where a person is deprived of liberty an up-to-date register shall be kept. This requirement is repeated in Rule 7 of the Standard Minimum Rules, which also rules that "[n]o person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register."²⁰

²⁰ SMR 7(2), See *Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit*, *op. cit.* p.15

(c) Processing bail in the courts

Law Clinics have been known to intervene in processing administrative bail for indigent prisoners. For this purpose, there is nothing in any law that prevents them from representing the prisoners before court registrars to get information, and to process bail for those unable to post bail conditions. The clinic could also engage the services of pro bono lawyers for assistance based on information obtained in this process.

(d) Advocacy with the Director of Public Prosecution (and Attorney-General)

Clinics involved in prisons and pre-trial detention matters do make interventions by way of advocacy visits to the office of the Director of Public Prosecution (DPP) and the Attorney-General. This intervention can achieve much for the prisoner or pre-trial detainee, including but not limited to: Fast-tracking the DPP's advice and or prosecution of cases; recovery of missing files, etc.

(e) Advocacy with the Chief Judge

The Law Clinic could intervene at the level of the Chief Judge of a State where the Clinic is engaged. It could draw the attention of the Chief Judge to cases deserving attention during Jail delivery exercises, and actually intervening during such exercises on behalf of clients. Advocacy visits to the Chief Judge also helps in drawing the attention of the Judge to the alarming number of poor persons languishing in Prisons, and thereby persuading more frequent jail delivery visits.

(f) Partnering with Legal Aid Council

Based on data collected during prison visits, the Clinic could partner with the Legal Aid Council of Nigeria for necessary legal representations for deserving clients. In those cases where the Clinicians are not able to represent Prisoners and Pre-trial detainees, the Legal Aid Council could be of assistance. There is presently a working arrangement between the Legal Aid Council of Nigeria and the Network of University Legal Aid Institutions, NULAI, Nigeria for collaboration with the Law Clinics engaged in

Prisons service. Legal Aid Council lacks manpower. Law students acting as paralegals can assist the Legal Aid Council with data collection, interviews of prisoners and detainees, tracing, monitoring, etc.

(g) Partnering with the Human Rights Commission

Law clinics can also partner with the National Human Rights Commission. As part of its functions, the National Human Rights Commission may visit persons, police cells and other places of detention on order to ascertain the conditions thereof and make recommendations to the appropriate authorities.²¹ The National Human Rights Commission may give students of law clinics short training on this investigative skills and the law students as paralegals can do this field work on behalf of the Commission.

Law Clinics can also send petitions on behalf of prisoners and detainees to the Commission when they find cases of violation of human right.

(h) Interventions through private legal practitioners

Law Clinics engaged in prisons and pre-trial detention cases can intervene through private legal practitioners who render pro bono services and those willing to offer some of their time and skills free of charge. One of the challenges of pro bono services by private legal practitioners is time factor. Law Students can reduce the impact of this and thereby encourage more lawyers to render pro bono services by assisting the lawyers with the preparation of all necessary letters, petitions, writs, motions, pleading, brief where a matter is to be filed or pursued in court, so that the lawyer will only have to deal with the actual court representation.

(i) Interventions through NGOs

Law Clinics can partner with Non-governmental organizations that work or support work in the prison and detention centres.

²¹ Section 6(1)(d) National Human Rights Commission Act.

6.3.3 INTERVENTION THROUGH WORKSHOPS, RESEARCH AND PROJECTS

Prison Pre-trial detainee law clinics can also intervene through workshops and seminars, research and projects and publication of reports on the state of prisoners and pre-trial detainees.

The outcome of such workshops and published research/project reports could be very useful for the work of other stakeholders in attending to the cause of prisoners and pre-trial detainees. It has been rightly observed that prison visits lift the veil on life behind the walls but do not necessarily reveal the full picture. The full picture can only be obtained by extensive crosschecking of facts outside of prison (with NGOs, human rights institutions, medical personnel in hospitals, prison chaplains and other visiting groups.²²The Law clinics have come to be recognized in this wise.

6.3.4 DIRECT REPRESENTATION BY STUDENTS

Although student cannot make formal representations in courts in Nigeria, as paralegals they can make limited representations before court registrars, Police, DPP and other informal offices to represent prisoners and pre-trial detainees. An important aspect of representation is for those detained at Police, Immigration, and Customs, SS, EFCC, ICPC cells and other pre-trial detention centres before they are charged in court under the supervision of qualified lawyers who are their teachers and supervisors and other lawyers assisting the law clinics.

Clinics can send petitions to the President/Governor on behalf of prisoners and detainees and to the Prerogative of Mercy Committee to consider pardon or other reprieve for a prisoner in appropriate cases.

²² *Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit, op. cit. p. 2*

Clinics can seek medical help for prisoners and detainees.

Clinics can assist a detainee in appropriate cases in criminal law to establish an atmosphere for mediation with a complainant that may lead to the withdrawal of the complaint and thereby secure freedom for the detainee. There has been cases where some of our clinics have mediated between detainees and family members who were the complainants in cases that originated from family feud or disagreements or in cases where homicide occurred wholly by accident.

6.4 LAW CLINIC INTERVENTION MODELS AND PROCEDURES

Different Law Clinics involved in Prisons and Pre Trial Detention matters adopt different approaches or procedures in the intervention at the Prisons. The following outline of procedures are common to most of the clinics;

- i. Preparation of Lesson/project Plans with detailed activities, incorporating the following:
 - (a) Pre-visit preparations; Prison visit workshop, class seminar;
 - (b) Interview and counselling sessions/ethics/Role play using case studies/and groupings;
- ii. Prison visits:
 - (a) interviewing of Prisoners/pre-trial detainees
 - (b) Counselling
 - (c) Data collection
 - (d) Observation
- iii. Report and opinion writing;
- iv. Follow-up activities: repeat visits, interventions: contacting family/relations, bail, seeking medical help, referrals (pro-bono lawyers, NGOs, NHRC, LACON, etc), follow up with the offices of A-G, DPP, State Counsel on writing legal opinion on the cases, advocacy visit with the Chief Judge on jail delivery, follow up with police on transfer of case files, petitions to Governor/President, Prerogative of

Mercy Committee; preparing writs, motions, pleadings for referrals to lawyers; obtaining certified records of proceedings from courts for further action in court or appeal, etc.

6.5 CHALLENGES FACING PRISON PRE-TRIAL DETAINEE LAW CLINICS

There are various challenges that law clinics face in the course of their carrying out the task of alleviating the dire conditions of detainees, either in detention centres or in the prisons.

i. Occasional uncooperative attitude of Prison officials and other officers of detention centres

One major challenge facing law clinics working at the prisons and pre-trial detention centres is the occasional uncooperative attitude of prison officials and other law enforcement officers of relevant agencies. This factor has been identified in the reports of various law clinics in Nigeria working in the prisons and detention centres.²³ Law enforcement agencies in Nigeria are numerous, and beyond the Prisons are the Police, State Security Services, Immigration, Customs, the Civil Defense Corps, etc. Most of the time and for several reasons the officers of these agencies do not co-operate with the law clinics. Reports from existing Prisons-based clinics indicate more cooperation from the Prisons while Police officers rank highest in the failure of cooperation.

In the cases of Prisons and the Police sometimes the officers see the Law Clinics as coming to interfere in their official duties which they pretend to be doing "so well". It has always been suggested that law clinics should strive to maintain a cordial working relationship with these law enforcement agencies by carrying out extensive enlightenment campaigns and advocacy visits with the

²³See for instance, ABSU Prisons Service Law Clinic: <http://absulawclinic.blogspot.com/2009/02>, *loc. cit.*

agencies²⁴. These would make the agencies realize that law clinics are partners in the criminal justice sector. They should be sensitized to obey rules and regulations that govern the detention centres while adopting a human rights approach.

ii. Illiteracy rate

The high rate of illiteracy among detainees, prisoners and the populace constitutes a great challenge. Despite the vast natural resources Nigeria is endowed with there is still a high illiteracy rate. This illiteracy rate affects the perception of Nigerians about their persons and dignity, knowledge, respect, human rights and enforceability of rights generally and right to a dignified human existence in particular. This fact results in lackadaisical or nonchalant approach of pre-trial detainees and other prisoners on issues pertaining to human rights and the enforceability of these rights as well as the proper channel to the exercise of the rights. The saying goes that knowledge is power.

It has been observed that in assessing the prison system there is need for:

awareness that efficient management and humane prison conditions are not dependent on the prison authorities alone. What happens in prisons is intrinsically linked to how the criminal justice system as a whole is managed, and what pressures that system is under from politicians and the public²⁵.

Thus, the lack of this awareness on the part of detainees, prisoners and the populace constitutes a great challenge that the clinics encounter. The existing law clinics have been involved in various incidences where the detainees have chosen to pay bribe to regain their freedom, rather than allow the law clinic follow the proper channel to secure their release. To some of these prisoners the law clinic is just one of those people who come in with vain

²⁴ *Ibid.*

²⁵ *Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit, op. cit. p. 1*

promises and at the end, do nothing. Some are not even desirous of enforcing their rights as they have resigned to fate. All these have negative impact on the work of the law clinics.

iii. Poverty

Poverty is also a major challenge affecting the ability of law clinics to enforce certain rights of prisoners and other pre-trial detainees. It is a known fact that majority of Nigerians²⁶ live below the poverty line of \$1.25 per day. One will thus wonder how such persons could ever finance the enforcement of their fundamental human rights. Poverty also has the effect of affecting the psyche of these persons, including their relations. It further affects the extent to which these people can cooperate with the law clinics in the pursuit of their freedom. Situations have arisen where the clinicians have had to use their personal funds to pursue the cases of these detainees to logical conclusion and this is really difficult. The challenge posed here is appreciated more when it is realized that the clinics have very little funds and limited time to pursue these matters. It is always recommended that the law clinics should partner more with organizations and persons who provide financial assistance. This has not really worked.

iv. Increasing population of pre-trial detainees and Prisoners

In Nigeria there are an alarming number of prisoners and pre-trial detainees falling within the categories of potential clients of the law clinics. Unfortunately the law clinics are few and with a similarly small number of clinicians that can hardly make any impact on the number desiring the free legal services. It therefore means that the law clinics are constantly faced with excess workload that they cannot cope with. Again, there are very few law

²⁶ Population below poverty line of 70% by 2007 Estimates: CIA World Fact book: See *Nigeria Population Below Poverty Line*; www.indexmundi.com/Nigeria/population_below_poverty_line.html, last accessed 07 February 2012.

clinics in Nigeria, not evenly spread in areas with Prisons and pre-trial detention centres.

v. Distrust by relevant authorities and other persons

The law clinics, particularly the student clinicians, at times are faced with negative reactions and distrust from both the authorities and persons concerned with detention centres and prisons. These persons have the mentality that the student clinicians are not yet fully trained to handle the cases the clinics hold the students out as capable of handling. This could be discouraging to the student-clinicians.

vi. Limited resources of the Law Clinics to effectively offer their services

The law clinics are grappling with the challenge of limited resources and particularly funding of the projects. A lot of resources are required for the delivery of legal services in pre-trial detention and Prisons cases. It is on record that the law clinics have so far been funded by the umbrella organization in Nigeria, the Network of University Legal Aid Institutions, courtesy of funds from the MacArthur Foundation, Open Society Justice Initiative, etc. Some Universities like Abia State University also assist by providing little funds for the clinic. However, these specific funding are not sufficient for the complicated cases that the clinics have had to handle. It is a matter of common knowledge that a lot of funds go into cases, particularly when they are pending in court. The expenses incurred in such situations are hardly within the contemplation of funders. To effectively render free legal assistance to indigent members of the public a lot more resources, in funding and other materials should be channelled into law clinics activities²⁷. Furthermore, it is suggested that the law clinics

²⁷Such other limited resources include infrastructure, office, equipment, transportation, expert and complementary staff, etc.

should partner with other organizations and persons ready to support these activities.

vii. Time constraints and unstable university calendar

The crowded curricula of most Law Faculties do not take into consideration the clinical programmes. This has negatively affected the efficiency of the law clinics and thus constitutes a serious challenge. In other words the student clinicians and the law clinics generally have little time for the clinical work. This factor is worsened by the occasional break in the academic calendar due to industrial disputes. The law course which incorporates the work of the law clinic is known by various names in various Law Faculties and designed to suit local circumstances.

Furthermore, in some faculties, the course is made compulsory for all law students of a particular designated year of study, while in some other faculties the courses are elective. Whatever form it takes there is evidence that any committed participation of the student clinicians in the clinical work will negatively affect the time available for other courses. This is due to the fact that the educational curriculum of a typical law student is very crowded with the law courses having 4 credit hours and other courses having not less than two credit hours. It is therefore common place to see our student clinicians complaining of much academic workload, which greatly interferes with their dedication and time to execute clinic work. This also includes pre-trial and prison detention matters. Full integration of clinical programmes into the Faculty timetable and requisite planning to accommodate the workload of student clinicians is necessary for the effective execution of pre-trial detention matters and prison service delivery.

Another dimension to time is the increased workload of teachers and supervisors who are not additionally remunerated. This has seen most of them refuse to work or abandon the clinical projects assigned to them. Supervision of students at the clinic is critical and faculties should be willing to balance the workload of the

teachers involved in the clinics so that students can receive adequate supervision.

The frequent disruption of University academic calendar due to incessant industrial disputes in the educational sector has been a major challenge. Since the prisoners and pre-trial detention law clinics constitute a project in the academic work of the students, any disruption in the calendar definitely affects the programme. Existing clinics now prepare for this kind of disruption by selecting a group of core clinicians who are ready to devote time for the work during break periods. The extent to which these students could cope without supervision and outside the Faculty's operation is in doubt.

viii. Right of representation like lawyers

The limitation imposed by statutes on the practice of law is another challenge. For instance, the Legal Practitioners Act makes elaborate provisions that for a person to be allowed to practice law in Nigeria, such a person must have a university law degree and has completed a study in the Nigerian Law School, and has been called to the Bar by the Body of Benchers and has his name on the roll of legal practitioners kept by the Chief Registrar of the Supreme Court of Nigeria.²⁸ Obviously students do not qualify here. It is therefore the case that this is a great challenge to the law clinics as the student clinicians are estopped from appearing in the courts as counsel and representing their clients. Despite the facts that student clinicians play major roles in case preparation, drafting of documents, counselling of clients, filing and taking of the requisite steps for the proper adjudication of these cases by the appropriate courts, it seems that this statutory inhibition is a big setback. This is a challenge to pre-trial and prison detention work of the law clinics, more so as the clinics have limited access to qualified lawyers who can represent their clients *ex gratia* in court.

²⁸ See generally Sections 4, 5 and 8 of the Legal Practitioners Act, Cap LII, Laws of the Federation of Nigeria, 2004.

ix. Lack of data or reliable data

Nigeria is still struggling with underdevelopment, lack of technological advancement and the attendant consequences. These consequences pose observable challenge to clinical work. For instance there is unreliable data concerning prisoners and pre-trial detainees, including the stages and details of their incarceration, and previous steps that have been taken, among others. This point is not peculiar to Nigeria.

The Criminal Justice Assessment Toolkit²⁹ has rightly observed that:

Prison visits lift the veil on life behind the walls but do not necessarily reveal the full picture. The full picture can only be obtained by extensive crosschecking of facts outside of prison (with NGOs, human rights institutions, medical personnel in hospitals, prison chaplains and other visiting groups, ex-prisoners and prison staff), in addition to research conducted inside the prison.

A lot of work needs to be done to obtain working data. The prisons and other detention centres do not have the needed records of the persons under their custody and this factor exposes the law clinics of access to accurate records with which to work. Precious time and resources are spent in the process of obtaining data to work with. In view of the limited time available to the clinicians, the lack of data generally or reliable data in particular constitute a clog to the work.

x. Lack of cooperation by colleagues

Lack of cooperation by traditional law teachers poses a serious challenge to the activities of the law clinics. While training and persuasion would appear to have reduced to some extent the initial apathy and opposition from traditional law teachers to clinical legal education programmes, they still do not appreciate why the students should go to the prisons. Experience from existing law clinics confirms that these aberrant teachers would rather schedule

²⁹ *Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit*, op. cit. p. 2

lectures or tests, on days fixed for prisons visits to sabotage the exercise. Such conflicts dampen the spirit and morale of the students.

xi. Standard training needs of supervisors and students

In order to achieve the service objectives of the prison law clinic, both supervisors and law students require adequate training. Using barely trained students to serve citizens in need will not be in the interest of the clinics, students, faculty and the profession. Supervisors need continuing capacity building training and exposure to filed practices.

xii. Awareness of the relevance of the Law Clinics

There is very little recognition or generally low level awareness on the relevance and role that law clinics could play in the criminal justice system. This lack of awareness has hampered greatly positive reactions and cooperation with the existing Law Clinics by individuals and organizations, including those involved in the criminal justice systems. Thus, an extensive public enlightenment programme of law clinics is recommended.

CHAPTER 7

Professional Responsibility and Ethics

OUTCOMES

Explain and discuss ethical rules and responsibilities and duties of a lawyer to a client; and the special rules for prison work.

7.1 INTRODUCTION

Students working in prison pre-trial detention law clinics, and serving prisoners and pre-trial detainees at prisons owe responsibility of good ethical conducts to their clients, the faculty, the legal profession as well as the prison authorities. In other words, though not legal practitioners in the strict sense of that expression¹, and obviously not professionally responsible under the Act² or the Rules³, the students are committed to responsibilities, obligations, values and ethical standards arising from their work in the law clinic.

The ethical rules governing prisons and pre-trial detainee law clinic students are akin to some of those owed by lawyers to clients since the activities of both groups are analogous. This flows from the position of authority and influence the students occupy by

¹A person entitled in accordance with the provisions of the Act to practice í either generally or for the purpose of any particular office or proceedings: Section 24, Legal Practitioners Act, Cap L11, Laws of the Federation, 2004; see also *Adeleye & Anor v Yaro (Unrep)*, Suit No. CA/L/266/2002, ruling delivered on 25 June 2010, Court of Appeal, Lagos Division; *Okafor v Nweke* [2007]10 NWLR Pt. 1043, p. 521.

²Legal Practitioners Act, *ibid*.

³Rules of Professional Conduct for Legal Practitioners, S.I. 6, 2007, made pursuant to section 12(4) of the Legal Practitioners Act (hereinafter: öRPCö).

virtue of being held out in the justice delivery system as paralegals. Thus, it is necessary to highlight broad-based rules of ethical conducts and behaviours directly or indirectly implicated in the work of students as paralegals. Understanding the rules and ethics is to dissuade temptations to act unethically, or make wrong ethical choices in the otherwise noble service. Hence, it is useful to identify and set out rules for the proper course of action for law clinics and students at the prisons. There is need to identify ethical standards relevant to the work, and other non-ethical rules. These are no more than those usual, common or normal conducts required of, or considered by relevant authorities or citizens as minimally obligatory either with specific reference to vocations at the Prisons and membership of Clinics, or generally as persons engaged in practice of law.

Definition

For its purposes, this chapter recognises that ethics and professional conduct are intricately connected, and some rules of professional conduct do not specifically show the demarcation between ethics and other professional conducts.

Ethics is the branch of study dealing with what is the proper course of action for man. It answers the question, "What do I do?" It is the study of right and wrong in human endeavours. At a more fundamental level, it is the method by which we categorize our values and pursue them. Ethics is a requirement for human life. It is our means of deciding a course of action. A proper foundation of ethics requires a standard of value to which all goals and actions can be compared to. This is our ultimate standard of value, the goal in which an ethical man must always aim⁴

⁴ See "Ethics", http://www.importanceofphilosophy.com/Ethics_Main.html, accessed 31 December 2011

In another vein, *ethics* has been widely defined as *the rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc.*⁵ Legal Ethics is defined as *the standards of minimally acceptable conduct within the legal profession, involving the duties that its members owe one another, their clients and the courts*⁶

To this extent, rules of professional conduct may prescribe some ethical standards for specific professions as well as other non-ethical rules. Charles Candide-Johnson rightly observes that:

Ethics is a word sometimes used to refer to the set of rules, principles, or ways of thinking that guide, or authority to guide, the actions of a particular group, and sometimes it stands for the systematic study of reasoning about how we ought to act. The legal profession just like every other profession has its code of conduct, which regulates and controls the affairs of its members. These codes express in the broadest of terms the standards of professional conduct expected of lawyers in their relationship with the public, the legal system, and the legal profession. In Nigeria, these are the Rules of Professional Conduct in the Legal Profession...⁷

The rules of professional conduct unarguably incorporate and dictate the ethical rules set for members. It also goes beyond ethics to other matters of professionalism, which are strictly not ordinary ethics but prescribed or prohibited. Rules of ethics on the other hand set out the principles that guide members' conduct generally. Again, some rules of ethics of the legal profession arise by virtue of the role that lawyers play *vis a vis* their clients.

⁵See <http://dictionary.reference.com/browse/ethics>, last accessed 31 December 2011.

⁶ See *Black's Law Dictionary*, (1999), Garner, B.A. (Ed.) 7th ed., p.904

⁷ Candide-Johnson, C., *Need for Professional Ethics in Law Practice*, (24 January 2011); <http://www.nigerianbestforum.com/generaltopics/?p=91775>; last accessed 31 December 2011.

Ethics or ethical standards have to do with morals, value and integrity. These are "Principles that when followed, promote values such as trust, good behaviour, fairness, and/or kindness."⁸ It is noted that there is "not one consistent set of standards that all groups follow, but each group has the right to develop the standards that are meaningful for their organization or profession."⁹

7.2 PROFESSIONAL RESPONSIBILITY AND ETHICS

Working in accordance with known or identifiable professional responsibility and ethical standards would be a matter of integrity for the Prisons/Pre-Trial Detainee Law Clinics. Student-clinicians working at the Prisons and for prisoners or pre-trial detainees are expected to be familiar with the rules of professional conduct or principles of practice and ethics related to the work. Integrity in this perspective has been described as:

a concept of consistency of actions, values, methods, measures, principles, expectations and outcomes. In western ethics, integrity is regarded as the quality of having an intuitive sense of honesty and truthfulness in regard to the motivations for one's actions.

Integrity can be regarded as the opposite of hypocrisy, in that it regards internal consistency as a virtue. One may judge that others "have integrity" to the extent that they behave according to the values, beliefs and principles they claim to hold. In legal practice, integrity will therefore be defined as fidelity to the values, beliefs and principles of a model of ethical and, if you like, moral law practice.¹⁰

⁸*Business Dictionary*: <http://www.businessdictionary.com/definition/ethical-standards.html>, accessed 31 December 2011; Agbebaku, C.A. & Omoregie L.O., "Teaching Ethics and Values in the Legal Profession: The Nigerian Perspective", <http://www.ialsnet.org/meetings/teaching/papers/Agbebaku.pdf>, last accessed 24 January 2012.

⁹ *ibid*

¹⁰ Candide-Johnson, C., loc cit.

Students working at the law clinics must maintain very good ethical standards. The professional rules or ethics would simply serve as clear guidelines defining what to expect with respect to the paralegal work they are required to perform.

Professional ethics simply recognise that persons engaged in certain vocations are placed in critical decision-making positions affecting the lives of others. There should be a guide as to how this power is utilised in practice. This is important for the clinicians not just for the immediate role they wish to play at the Prisons but also as students of law desiring to join a profession which holds custody of societal ethics, norms and values¹¹. It is these ethics, norms and values that they are required to apply and imbibe. Rules of professional responsibility and ethics for prison pre-trial detainee law clinics could be identified from two main sources: the principles of ethics found in various codes of ethics and a reference to rules of professional conduct for legal practitioners in Nigeria as a guide.

7.3 ETHICAL ISSUES RELATING TO PRISON WORK

In his/her relationship with the prison authority, detainee and the public some ethical issues may be implicated. Generally, code of ethics has been known to arise from seven principles. These are: dignity/integrity at work; confidentiality; legal requirements; conflict of interest; dilemmas; and competence and diligence in the case of professionals. These principles provide a guide to ethical issues concerning Law Clinics working in Prisons and other detention centres in Nigeria.

¹¹Wali, A.B. (1999), "As You Become Lawyers", *Nigerian Law and Practice Journal* (N.L.P.J.), Volume 3, No. 2 (October 1999), 127

7.3.1 DIGNITY/INTEGRITY AT WORK

The Law Clinician must at all times display dignity and integrity in the public service. Dignity and integrity will comprise acting with integrity-honestly and transparently, as well as to communicate with decorum and civility.

i. **Acting with integrity-honestly and transparently**

By its nature, the legal profession is founded on the cherished ideals of honesty, transparency and integrity.¹² Acting with integrity means that a student will be honest and transparent, and at all times will act with high ethical or moral principles. The starting point of this value is that student shall introduce himself/herself as a law student, working under supervision; and not a qualified lawyer licensed to practice law, disclosing precisely his/her limitations and his/her precise capability in rendering legal assistance. The student must not act in any fraudulent, dishonest, criminal or illegal manner or, or with an intent to circumvent or assisting anybody to circumvent the law. It has been suggested that if integrity is lacking, the paralegal's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the paralegal may be¹³. This applies with equal force to a student. It may also be unethical to engage in improper solicitation and advertising- in the form misleading representations regarding potential results. These will impinge on integrity.

ii. **Communicating with decorum and civility**

It is an important aspect of ethics that a law student observes the duty to communicate with decorum and civility. In all communications with the client, prison and other officials, supervisors, lawyers and the public generally, that decorum, candour and civilised manner of appearance, speaking and

¹²Wali, A.B, op cit,128; See also, Apará, A.,(1996)*The New Wigs-An Introduction to Legal Practice*, Ibadan, Distinct Publications, 13.

¹³ See Paralegal Professional Conduct Guidelines, (2008), of the Law Society of Upper Canada.

communication befitting his/her status as a law student must be exhibited. An illustration of such unethical communication that the law student must guard against is found in the case of *Global Transport Oceanico S.A. & Anor v Free Enterprises Nig. Ltd*¹⁴ where counsel had under "Issues for Determination" column referred to the trial judge in the third person pronoun "she", instead of more appropriate expressions like "learned trial judge", "learned judge" or "honourable judge". The Supreme Court considered this communication as absolutely unethical and discourteous.

It is noted that the Law Society of Canada had some time ago decreed that all Law Schools in Canada must require their students to complete a course in ethics and professionalism. The first item on the list of subjects for the course was "duty to communicate with civility"¹⁵.

7.3.2 CONFIDENTIALITY

There is generally a duty to maintain confidentiality. Confidentiality extends to all students and staff of the clinic with respect to the records and communication of any client. The duty of confidentiality requires maintaining the secrecy of all confidential information received in the course of representing a client. There is no doubt that law clinicians working for Prisoners and pre-trial detainees would always receive confidential information in the course of the work and this duty is paramount. The clinician must maintain the secrets of the prisoner. Disclosure outside the permitted ambit is unethical, and may affect the future credibility of the law students, clinic, law faculty and the university..

Rule 19 Rules of Professional Conduct (RPC) provides that:

¹⁴ (2001) 5 SCQR 487.

¹⁵ See Dodek, A, "An Education and apprenticeship in civility: Correspondent's Report from Canada", *Legal Ethics*, Volume 14, Part 2, 240

- (1) Except as provided under sub-rule (3) of this rule, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged.
- (2) Except as provided in sub-rule (3) of this rule, a lawyer shall not knowingly-
 - (a) reveal a confidence or secret of his client;
 - (b) use a confidence or secret of his client to the disadvantage of the client; or
 - (c) use a confidence or secret of his client to the advantage of himself or of a third person unless the client consents after full disclosure.
- (3) A lawyer may reveal:
 - (a) confidence or secrets with the consent of the client or clients affected, but only after full disclosure to them
 - (b) confidence or secrets necessary when permitted under these rules or required law or a court order;
 - (c) the intention of his client to commit a crime and the information necessary to prevent the crime.

Again, Rule 23(1) RPC requires that a lawyer shall not do any act whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

7.3.3 UPHOLD AND OBSERVE LEGAL REQUIREMENTS: DUTY TO ACT WITHIN, IN OBEDIENCE AND COMPLIANCE WITH LAWS AND RULES

A law student must adhere strictly to every statute, as well as all civil and criminal laws or rules that relate to the practice in prisons. The student must not knowingly act in breach of any such statute, civil or criminal laws or rules, or otherwise engage in or condone any act to circumvent any such law or rule. In the circumstance, in his/her relationship with the prison officers/authority, the student is expected to obey and comply with all regulatory requirements. Obedience to and compliance with all legal requirements and regulations, including ethical rules pertaining to prison work

generally is necessary and essential. Instances of relevant rules and regulations include:

(a) Seeking permission of Prison officials

The least of the Prison regulations require vital permissions before visiting the prisons or before relating with the prisoner or detainee, during visits. The student is obliged to obey this rule. There is no hard and fast rule as to how the permission is sought or obtained. It could be by ordinary letter seeking permission, by visitation on advocacy visits or any other way by which permission to visit and work in the prisons is given. When a good relationship has been established between the Law Clinic and the Prison, communications for permission become easier through telephone, and sms.

(b) Trafficking

There is also a rule against trafficking/smuggling in items, or assisting the detainee in any way to bring in unauthorized materials into the prisons. In other words, beyond the permitted legal aid/assistance that the student is permitted to render, the student should not fall victim of trafficking or smuggling of things into and out of the prisons. The offence of trafficking is provided for in section 14(1) (a) of the Prisons Act¹⁶. The section states inter alia:

(1) any person who brings, throws, or otherwise introduces into or removes from prison or gives to or takes from a prisoner, any alcoholic liquor, tobacco, intoxicating or poisonous drug or article prohibited by regulations made under this Act, or í , shall be guilty of an offenceí

¹⁶ *Cap. P29* Laws of the Federation of Nigeria, 2004

(c) Security measures

It must be recognized that the prison is regarded as a part of the security apparatus of the government, and all measures put in place for the purpose must be observed. A Comptroller of Prisons¹⁷ observes that the Prison is:

a security agency of the state and in fact, it is the last line of defence for the government. We therefore see everybody in the prison as a "potential suspect" – inmates (sic), staff and visitors alike. Therefore prison officers exercise watchful eyes over everybody in order to ensure the attainment of the slogan "all correct". There have been instances where people have tried to commit one criminal act or the other in the guise of coming to the prison to render Religious, Educational or even legal Services to the inmates (sic). Some visitors have been arrested in their efforts to either smuggle Indian hemp, saw blades, or even pistols to their relations in the prison in order to circumvent the security of the prison.

The student must avoid being caught in any security lapse at the Prisons.

(d) Communication

As a rule, as a visitor to the prisons, the student is not allowed to communicate with the prisoner/detainee without the consent of the superintendent. The rule applies to all visitors. It is an offence if any person "communicates, or attempts to communicate with a prisoner without the permission of the superintendent."¹⁸ Prisoners should not be used to pass on information on other prisoners to the prison administration. If an informant is discovered he or she can become the victim of violent reaction by other prisoners.¹⁹ A

¹⁷ Ntewo, C. S., loc cit: <http://absulawclinic.blogspot.com/2009/02/>, loc cit

¹⁸ Section 14(1) (b) Prisons Act

¹⁹ "Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit", *op cit*, 29

transgression of this rule is also a transgression of the rule of confidentiality.

(e) Smuggling of other items-Food, Telephones, Camera, metal objects and other dangerous objects

The prison rules also prohibit the smuggling of other items into the Prisons for use of prisoners or otherwise. Nobody, no matter the relationship with the prisoner, is allowed to bring in food of any kind for the prisoner without the consent or approval of the Prison superintendent. Before food is allowed, the prison officials normally require it to be tested by the person bringing it. Similarly telephones, cameras, laptops, recorders, metal objects like knives, guns, and other dangerous objects are not permitted to be taken into the prison during visits.

(f) Photographs/video

As a rule, photographs and video recordings of the prisoner or detainee are generally not permitted in the Prisons, and of Prisoners or Pre-Trial Detainees. Such photograph or video could be taken with the permission of the Prison official, and consent of the Prisoner or detainee. Subject to security measures the Prison authority may take, the extent to which permission is given for photographs and video recordings to be made in the prisons could give an indication of the human rights posture of particular prison authorities.

(g) Duty to refuse to aid unlawful conducts generally

The law student must refuse to be party to any unlawful conduct pertaining to the prisoners and pre-trial detainees.

Rule 15 of the RPC requires that:

- (1) In his representation of a client, a lawyer may refuse to aid or participate in conduct that he believes to be unlawful even
-

though there is some support for an argument that the conduct is legal.

(2) In his representation of his client, a lawyer shall:

(a) keep strictly within the law notwithstanding any contrary instruction by his client and, if the client insists on a breach of the law, the lawyer shall withdraw his service;

(b) use his best endeavours to restrain and prevent his client from committing misconduct or breach of the law with particular reference to judicial officers, witnesses and litigants and if the client persists in his action or conduct, the lawyer shall terminate their relations.

(3) In his representation of his client, a lawyer shall not:

(a) give service or advice to the client which he knows or ought reasonably to know is capable of causing disloyalty to , or breach of, the law, or bringing disrespect to the holder of a judicial office, or involving corruption of holders of any public office;

(b) i

(g) Knowingly make a false statement of law or fact:

(h) participate in the creation or preservation of evidence when he knows or ought reasonably to know that the evidence is false;

(i) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; or

(j) Knowingly engage in other illegal conduct or conduct contrary to any of the rules.

(4) Where in the course of his representation of his client a lawyer receives clearly established information that the client has perpetrated a fraud upon a person or tribunal, he shall promptly call on his client to rectify it, and if his client refuses or is unable to do so he shall reveal the fraud to the affected person or tribunal, except when the information is a privileged communication; and if the person who perpetrated the fraud is not his client, the lawyer shall promptly reveal the fraud to the tribunal.

(h) Law Clinic rules and regulations

The student must also work within the confines of Clinic rules and regulations. One important rule is that a student is not allowed to make written communication with a person or organ outside the clinic without the supervisor's approval. With regards to prison

pre-trial detention cases, the student cannot conclude the counselling and advise stage without the supervisor's approval. The procedure for clinic intake and acceptance of brief must be observed including compliance with the means-tests and completion of indemnity forms.

(i) No fee Rule

The basis of services rendered by law clinics is that the services are free of charge, and for the indigent. Collecting fees or splitting fee arrangements with other practitioners are prohibited. A student is not allowed to collect fees from prisoners or pre-trial detainees, and may not work to split fees with lawyers by connecting them to a matter they have worked on during visits to prisons. The student should also not collude with lawyers to share legal fees. By Rule 3(1)(c)RPC a lawyer shall not share legal fees with non-lawyer except as provided in rule 53. Students should never receive any form of gift from a lawyer or anybody including the client for referring law clinic cases to a law firm or lawyer. Law students should never accept any gift from any client for assisting the client as part of the clinic work. Where there is need to receive fund on behalf of a client for the purposes of meeting out-of-pocket expenses like filing fees, etc, an express approval of the Coordinator of the clinic or other authority must be received.

7.3.4 CONFLICT OF INTEREST

Ray Moses explains that conflict of interest occur when a potential client's interest are materially and directly adverse to the interest of another client, the lawyer or the lawyer's law firm.²⁰

Conflict of interest is one of those ethical principles prescribed and prohibited of persons engaged in legal practice. The duty is to avoid conflict of interest situations.

²⁰See "Client interview, criminal cases" http://criminaldefence.homestead.com/ClientInterview.html#anchor_33, accessed on 20th October 2012.

A law student, like a lawyer must avoid conflict of interest situations. These include representing both sides in a case handled by the Clinic, for instance representing a prisoner/pre-trial detainee and the complainant in the same case; or where the student's capacity is affected by his/her loyalty to some personal relationship or factors. Virginia P. Shirvington explains the Law Society of New South Wales 'Ethics and conflicts of Interest and duties'²¹ rules with the following examples:

- a. You act for both parties in a matter (whether in litigation or transactions);
- b. You act against a former client having previously acted for that party in a related matter (in which you may also have acted for your present client);
- c. Your own interest is involved, for example where you act in a transaction in which you or a company (or relation) in which you or an associate is involved or has an interest; or where for some other reason your own interests or an associate's may conflict with your client's, such as where you may be a material witness in your client's matter.

This code of ethics is prescribed under Rule 17 of the RPC and it requires in part that:

(1) A lawyer shall, at the time of the retainer, disclose to the client all the circumstances of his relations with parties, and any interest in or connection with the controversy which might influence the client in the selection of the lawyer

7.3.5 BALANCING INTERESTS AND ETHICAL DILEMMAS

Rule 14(1) of the RPC prescribes a lawyer's duty to devote his attention, energy and expertise to the service of his/her client and, subject to any rule of law, to act in a manner consistent with the

²¹ 2006, www.lawsociety.com.au, visited last on 10th October 2012.

best interest of the client. This rule definitely applies to a law student working in a law clinic. Where there is conflict of interest, the best option is for the clinic to withdraw its services. Where a dilemma arises during the course of a duty or service, the law student must resolve the dilemma in favour of ethical standards, rules and values.

7.3.6 COMPETENCE AND DILIGENCE

The student is expected to display the competence required of a professional in the work as a matter of professional ethics, which is, acting objectively as a professional person with requisite knowledge, skill and values.

With regards to competence and integrity, although not a qualified lawyer, a law student is expected to discharge his or her obligation to the prisoner with some reasonable level of competence and integrity and diligence. He/she should competently represent or act on behalf of the prisoner/pre-trial detainee and ensure that no further deprivation of loss is suffered by the client due to incompetence. It has been suggested elsewhere that prison assessors should not seek or hold private, individual interviews with prisoners, especially if no follow-up visit is planned. Private interviews, they argued generate expectations and some information given by a prisoner may put him or her at risk²². In such a case the Clinic could be accountable since no immunity from suit is enjoyed by lawyers.²³ There is nothing that stops a prisoner from suing for any wrongful act of the Clinic student except where the client has signed an agreement conferring immunity on the clinic.

²² Custodial and Non-Custodial Measures: The Prison System-Criminal Justice Assessment Toolkit, *op cit*, 9

²³ See, Nwuche, E.S,(1995), 'The Legal practitioners Immunity for Negligence: A Reconsideration of Principles', *Abia State University Law Journal*, 32; see also Ojukwu, E, 'Hall v Simons: Are Nigerian Lawyers Still Immune from Liability for Negligence?', *Nigerian Law and Practice Journal*, Vol. 6, No. 1, (March 2002) 112

Thus, it would be unethical for students to display incompetence and lack of diligence in handling client's matter. The standard expected of the law student cannot be that of a trained and qualified lawyer; but definitely that of a reasonably knowledgeable law student-in terms of knowledge, skills and values. On the other hand, the law student must know the limits of his/her capacity and must consult or refer matters beyond his competence to the supervisor at the earliest opportunity. Rule 16 RPC requires that a lawyer shall not:

- (a) handle a legal matter which he knows or ought to know that he is not competent to handle, without associating with him a lawyer who is competent to handle it, unless the client objects;
- (b) handle a legal matter without adequate preparation;
- (c) neglect a legal matter entrusted to him.

He must also demonstrate the decorum required in the circumstances. Maintaining proper decorum will include, showing utmost respect, courtesy, humility and cooperation to officials and constituted authority, etc. Proper decorum, for instance requires the student must not give any assurance to the prisoner/detainee regarding his competence and capacity to get him out of the Prisons at all cost.

7.4 OVERVIEW OF RULES OF PROFESSIONAL CONDUCT

The Rules of Professional Conduct is divided into seven parts, to wit: Practice as a legal practitioner; Relation with clients; Relation with other lawyers; Relation with the court; improper attraction of business; Remuneration/fees, and Miscellaneous. No doubt, it is not all the rules of professional conduct for legal practitioners that may be relevant in prescribing rules or general ethics applicable to Law Clinics and Clinicians. However, the sections on practice and relation with the client are critically relevant in training the student. Particularly relevant are:

Section A-Practice as a legal practitioner:

Rule 1- General Responsibility of a Lawyer

Rule 2- Duty as to admission into the Legal Profession

Rule 3- Aiding the unauthorized Practice of the Law

Rule 4- Avoidance of Intermediary in the Practice of the Law, and

Rule 5- Association for Legal Practice.

Section B- Relation with clients:

Rule 14-Dedication and devotion to the cause of the client

Rule 15- Representing client within the bound of law

Rule 16-Representing client competently

Rule 17-Conflict of interest

Rule 18-Agreement with client

Rule 19- Privilege and confidence of a client.

Some of these and other Rules deriving from ethical principles have been discussed in the preceding section in relation to the ethical issues concerning law clinic's work. The point being made is that although not a lawyer, the student must note the Rules of Professional conduct as a guide. He/she should realise that he/she is not authorised to practice law in the first place, and must not pretend to be so doing. The student must also not be used to circumvent any of the rules, particularly Rules 3 and 4 which respectively prohibit "the unauthorized practice of the law" and "intermediary in the practice of the Law". It is noteworthy that unethical behaviour as a student of law may constitute a bar to the student being called to the Bar ultimately. The acts that cannot be performed by students include: representing clients in the courts as lawyers, signing court originating applications, writs, pleadings, motions; franking agreements; claiming to be a lawyer or pretending to be a lawyer.

Generally, professional responsibility indicates the conditions and standards of the calling or service and should apply; to the extent that is relevant to non-lawyers engaged in the services that lawyers are engaged to perform. For instance, on the general professional responsibility rules, there is a duty of professionalism-to act in a

professional manner in all dealings. Although law students are not lawyers, it looks like Rule 1 of the RPC is relevant in assessing the professional responsibility imposed here:

A lawyer shall uphold and observe the rule of law, promote and foster the cause of justice, maintain a high standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner.

This is the general responsibility of a lawyer, and there is no doubt that it sets a standard for all (including law students) who wish to perform certain roles ascribed to lawyers, notwithstanding that the student is not professionally qualified. The duty applies by virtue of the roles the Clinics play. It has been noted earlier that competence is an ethical principle. This issue implicates the need to obtain a signed legal indemnity from a Clinic's client to protect the Clinic, Faculty and or University from legal action for improper handling of case by the Clinic.

The relationship between a lawyer and his client is demonstrable by the duty to avoid any conflict of interest. As already discussed, a law clinician, like a lawyer must avoid conflict of interest situations: including representing both sides in a case, for instance representing a prisoner/pre-trial detainee and the complainant in the same case; or where the student's capacity is affected by his/her loyalty to some personal relationship or factors. Rule 17 of the RPC 2007 requires in part that:

- (1) A lawyer shall, at the time of the retainer, disclose to the client all the circumstances of his relations with parties, and any interest in or connection with the controversy which might influence the client in the selection of the lawyer.
- (2) Except with the consent of his client after full disclosure, a lawyer shall not accept a retainer if the exercise of his professional judgment on behalf of his client will be or may reasonably be affected by his own financial, business, property, or personal interest

(3) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation which he is conducting for a client ...

(4) A lawyer shall not accept a proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it is likely to involve him in representing differing interests, unless it is obvious that the lawyer can adequately represent the interest of each, and consents to the representation after full disclosure of the possible effect of such representing on the exercise of his independent professional judgment on behalf of each.

Again, there is a duty to strike a balance of interests.

Rule 14(1) of the RPC prescribes a lawyer's duty to devote his attention, energy and expertise to the service of his/her client and, subject to any rule of law, to act in a manner consistent with the best interest of the client. This rule definitely applies to a law clinician as already shown. Where there is conflict of interest the best option is for the clinician to withdraw services. Rule 21 of the RPC insists that:

(1) A lawyer shall not abandon or withdraw from an employment once assumed, except for good cause.

(2) Good cause for which the lawyer may be justified in withdrawing from the client's employment includes the following:

(a) conflict of interest between the lawyer and the client; and (b) where the client insists on an unjust or immoral course in the conduct of his case.

The profession also prides loyalty to the profession and the rules makes provision for the avoidance of conflicts between lawyers and law firms in undertaking representations for clients. Conflicts between two lawyers will arise from "improper representation or communication with a person already represented by counsel." It is unprofessional and unethical to attempt to represent or improperly

communicate with a person already represented by counsel on the same matter. This rule is at the very foundation of representation of indigent persons by Law Clinics as they must first ascertain that the would-be client is not already represented by counsel. Rule 19(5) RPC requires that: "A lawyer shall not in any way communicate upon the subject of controversy or negotiate or compromise the matter with the other party who is represented by a lawyer, and he shall deal only with the lawyer of that other party in respect of the matter." As a corollary, by Rule 54 RPC "A lawyer shall not accept any compensation, rebate, commission, gift or other advantage from or on behalf of the opposing party except with the full knowledge and consent of his client after full disclosure." Law students and law clinics must therefore find out at the earliest time during interviews if a proposed client is already being represented by another lawyer and where this is not clear but suggested by facts, communicate with the named lawyer or firm to clear the issues concerning engagement.

7.5 LAW CLINIC RULES AND REGULATIONS

Law students should be made to undertake prison interviews in pairs. A law student should not interview or interact with a prisoner or detainee alone. In addition to making the students learn team work, working in teams will reduce allegations of malpractice by the students.

Law students must also obey all other rules and regulations of the Law Clinic.

7.6 CONCLUSION

The foregoing constitutes the basis of ethical standards of conduct expected of law students working in prisons pre-detainee law clinics. They derive from the position the law students occupy in providing limited legal assistance and indulging in several paralegal activities resembling some of those performed by lawyers. Indeed the clinicians engage in some form of recognized legal practice. In Nigeria law students are not only responsible to their institutions for maintaining a high standard of ethics but also to the Body of Benchers who may determine their eligibility for call to Nigerian bar based on a character test. If a law student behaves in an unethical manner generally, that could be a bar to his/her being called to the Nigerian Bar.

The good character of a prospective legal practitioner is said to be of utmost importance²⁴. Good conduct has always been a condition precedent to entry into the legal profession²⁵. Elsewhere, it has been emphasized that:

In addition to the Bar exam and the prerequisites necessary to take the Bar exam, there is a less well-known requirement Bar applicants must satisfy for entry to the Bar: the moral character requirement. The moral character requirement demands that each applicant seeking admission to the Bar bear the burden of demonstrating to the appropriate body in charge that he or she possesses the character needed to successfully and ethically practice law.²⁶

²⁴See, Ogbu, N.O.,(2002), *Modern Nigerian Legal System* (Enugu, CIDJAP Publishers) 316

²⁵See Wali, A.B, op cit,127

²⁶Langford, C. M., "Barbarians at the Bar: Regulation of the Legal Profession through the Admissions Process" http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v36n04_CC1-Langford.pdf, accessed on 24 January 2012

As far back as 1906 in *Re Applicants for License Case*²⁷, Brown J. in a dissenting opinion had observed that if an applicant to the Bar passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace, a curse instead of a benefit to his community.

Any determination of a prospective applicant's moral character for purposes of being called to the Nigerian bar will definitively depend on his/her prior activities, including service in the Law Clinic.

²⁷55 S.E. 635, 642 (N.C. 1906); 143 N.C.I. 21, 1906; see also *Okonjo v Council of Legal Education* (1979) IFNIR 70; 1979 Digest of Appeal Cases (DAC) 2.

CHAPTER 8

Interviewing and Counselling at Prison Pre-trial Detainee Law Clinic

OUTCOME

Explain the guidelines for interviewing and counselling prison detainees.

8.1 INTRODUCTION

Client interview and counselling constitute a major component of a lawyer's job. In the activities of prison pre-trial law clinic, client interview is indispensable. This chapter discusses the guidelines for interview and counselling for prison detainees. However, since the interview and counselling skills are universal, we shall first do a general overview of interview and counselling skills in a global context. In the course of prison work, amazingly, some students will meet their first clients. A pre-trial detainee is a vexed personality, who must be handled with care. Not only must the student be attentive to the factual information the client conveys, but must also try to understand his or her needs and goals, assess credibility, and evaluate the empathy or antipathy the client might evoke. In doing this, students are advised to pay close attention during the interview and take brief notes about the client, the client's predicament and goals, and the interview itself.

8.2 WHAT IS CLIENT INTERVIEW?

Generally speaking, an interview is a question and answer session to test understanding. However, client interview is a questioning session between a lawyer and his or her client to elicit facts giving rise to a legal problem that would assist the lawyer in giving sound legal advice to the client. Legal interview has also been described as a complex conversation between a lawyer and person who believes that he has a problem which a lawyer may be able to solve.¹ The main functions and the golden rules for interview has been summarised in the *Professional Legal Training Handbook* of the Faculty of Law Clinic University of Durban Westville as follows:

Functions of Interview

- i. To provide a form of listening to a complete version of the client's initial story,
- ii. To ease off the tension on the part of a disturbed client,
- iii. To get relevant facts from the client, and facts gathering, which include obtaining relevant documents from the client,
- iv. The exchange of information between the client and the interviewer (student/attorney) consulting is not a one way process. The client will give and require information; the student will ask and provide information,

¹ University of Durban-Westville, Faculty of Law Clinic • Professional Legal Training Handbook, <www.ukzn.ac.za/handbooks/2010/LAW%20Handbook%202005.PDF> accessed on 10 December 2011

- v. To identify the legal problems confronting the client and establishing what the client wants. The object of consulting is to enable the attorney to acquire the factual knowledge about the case to assist him or her in solving the client's legal problem,
- vi. To assist the client in deciding what further action should be taken in the case,
- vii. Giving options and advising, which includes giving recommendations regarding the different options and
- viii. Obtaining instructions/ mandate from the client.

Golden Rules for Interview

- a. Ensure that you maintain your clients language throughout the conversation
- b. Avoid using legal jargon. Explain this to your client if using them cannot be avoided.
- c. Use simple language
- d. Maintain eye contact and focus on the interview
- e. Respect your client and make her/him feel important
- f. Be a good listener and do not interrupt the client
- g. Be professional and ethical at all times
- h. Should a client get emotional during an interview, be patient and support them. (Show empathy not sympathy)
- i. Ask your client questions and make sure you follow the story
- j. Encourage your client to ask questions
- k. Ensure that your client has the capacity to instruct
- l. Do not force certain options to your client
- m. Explain to your client what is going to happen after the first interview²

² *ibid*

8.2 INTERVIEW GUIDELINES AT THE PRISON³

1. Introduction

- a. Introduce yourself and help client relax.
- b. Tell client what the clinic does and your role as a law student working under the supervision of qualified lawyers.
- c. Write down client name, address and other contact information or use a form if provided to get the client's personal details.

2. Help Client tell the Story in General

Use open questions to get overview

3. Ask client about previous steps taken on the matter

Ask client about previous steps taken like consulting a lawyer, sending petitions etc and ask client about any correspondence or documents if any.

4. Help client tell the story in chronological order

Use closed questions and paraphrasing to get dates, times, and other details.

5. Check with client to be sure of client's needs

Recheck with client to be sure of the client's needs and goals.

6. Advise client/End interview

- a. Tell client your likely next steps, like returning to the clinic to present the interview report to your supervisor; and later come back to the prison (or another student would be coming back) to present options for solving the problem and counsel client.
- b. Do not present options or counselling at this stage unless cleared by your supervisor.

³ The interview guidelines as set out here are partly based on general guideline checklist produced and used by Prof David McQuoid-Mason and Prof Richard Grimes to facilitate a teacher training workshop of the Nigerian Law School in 2007.

7. Write a report of the interview with the client and present to your supervisor soon after the interview.

The report should be succinct and typewritten. The report should summarise⁴ the client's biographical information, statement of the client's problem, facts of the client's problem, client's goals, important dates including the date of the interview, things to do by the clinic or law student, suggested solutions to the client's problems to achieve the client's goals if possible; and any problems encountered at the prison that the clinic need to know about and address.

8.3 WHAT IS CLIENT COUNSELLING?

The word 'counselling' is subject to various but interrelated meanings. It is the art of giving advice based on problems identified. Counselling is the means by which one person helps another through purposeful conversation.⁵ However, client counselling from a legal perspective includes the line of alternative legal and non-legal opinions giving to client which is aimed at assisting the client in taking an informed decision to solve legal problems extracted from an interview session.⁶

⁴ As formulated by University of Durban Clinical Training Handbook, op cit., and modified by the authors. Kidd, J.M. (1996) 'the career' <counselling interview. eprints.bbk.ac.uk/243/1/kidd.pdf > accessed on November 10, 2011

⁵ www.b-u.ac.in/download/careertools/counselor%20skills.pdf , accessed on 13th Oct. 2012.

⁶ See Michael, P.L., (1992), *Effective Client Communication: A Lawyer's Handbook for Interviewing and Counselling*. St. Paul, MN: West Publishing Co.

8.3.1 FUNCTIONS OF COUNSELLING

The process of counselling as stated by Mike Megranathan⁷ has two functions:

- i) To help the person talk about, explore and understand his or her thoughts and feelings and workout what he or she might do before taking action;
- ii) To help the person decide on his or her own solutions.

8.3.2 STAGE FOR COUNSELLING AT THE PRISON

Students of Law Clinics are required not to counsel during the first interview session at the prison except with the permission of the supervisor. Students are to return after the initial interview to submit a report that makes suggestions on what to counsel. If the supervisor approves, the students (or another set of students) should then return to the prison to present the options and counsel the client.

8.3 CLIENT INTERVIEW SETTINGS AT THE PRISON (TIMING, DURATION, PRIVACY, ETC) AND PROCEDURE BEFORE THE PRISON VISIT

The prison is not like a law firm or a law clinic and the rooms provided by the prison officials for contact and interview of prisoners and prison detainees are not usually comfortable places. The students should also expect to see the prison officers at an eye-shot during their interaction with the prisoners or detainees. The time of contact with prisoners and detainees is determined by the Prison rules and the clinic must therefore work with such schedule. The interview must also be done within a time frame allowed by

⁷ öCounsellinö in Dorothy M. Stewart, Management Skills, Infinity Books, Delhi 2003 p.99, cited in Jayakumar S, öClient Counselling for Tomorrowø Lawyersö, www.atczu.com/downloads/eddy/client_counselling_for_Tomorrow.pdf, accessed on 13th Oct. 2012.

prison rules, and so the students must apply proper time management skills. At no time should less than two students meet with a prisoner or detainee.

To gain access to the prison the law clinic must first contact the prison to ensure their cooperation. Below are recommended procedures before visit to prisons for interview for first time visiting law clinics⁸:

- a. The clinic should write letters to prison officials for a courtesy visit;
- b. During the visit, discuss your forthcoming prison programme, including the aims,⁹ methods¹⁰ and gains¹¹. Also invite the concerned Prison Controller for a pre-field prison visit workshop.
- c. Organise a pre-field prison workshop and invite relevant stakeholders¹² involved in criminal justice administration to the workshop. Invite resource persons to talk on special topics that will help students to understand the settings and terrain of the prison visitation¹³.
- d. Before the actual visit, let the students draw up a proposed visitation schedule with timing and dates.

⁸ This procedure is used by Ebonyi University Law Clinic Nigeria, and similarly practiced by law clinics in Nigeria which are involved in prison work.

⁹ E.g. for students to learn by doing as part of their clinical externship curriculum

¹⁰E.g. via Interview (oral and through questionnaire)

¹¹ E.g. To enhance access to justice, carry out advocacy on prison needs, community service etc.

¹² The personalities to be invited may include, The Controller of Prisons, The Commissioner of Police, The Chief Judge of the State, The Attorney General of the State, The Chairman of Bar Association etc. We recommend that the Vice Chancellor or President of the institution may be the chief host.

¹³ A wide range of topics are ideal, such as ðA general overview of the prison situation in Nigeriað. Access to justice and prison administration in Nigeriað, ðEthics and code of conduct in prisonsð, ðModern research methodology skillsð, ðThe role of law clinics in tackling congestion challenge in prisonsð etc.

- e. Submit the schedule of your proposed visit to prison authorities, alongside with a letter asking for permission to visit the prisons.
- f. Go for feedback from prison authorities to receive approval or amended schedule and timing by the concerned Prison Controller.
- g. On approval for the visits, divide the student into groups.¹⁴

¹⁴ Depending on the number of students involved in the prison work. We however recommend a maximum of five students per group for effectiveness.

CHAPTER 9

Report and Opinion Writing

OUTCOMES

Discuss and explain the meaning, purpose and importance of report and opinion writing and the nature and structure of reports and legal opinion.

9.1 INTRODUCTION

Throughout the work of students in a prison pre-trial law clinic, students would be expected to present reports and written legal opinion from time to time. Report writing needs to be taken very seriously because it is evidence of work or activity performed. There is a general parlance that says 'a job is not completed until a report is submitted.' In a law clinic most of the reports and legal opinion required to be submitted by students would be assessed for credits.

9.2 MEANING, PURPOSE AND IMPORTANCE OF REPORTS

'A report is a presentation of facts and findings, usually as a basis for recommendations, written for a specific readership, and probably intended to be kept as a record.'¹ Birmingham City University Study Guide on Writing explains a report as follows:

¹ 'Report Writing', a take-away guide published by Multimedia Publishing Ltd, <http://lorien.ncl.ac.uk/tskills/reports/repwrite.pdf>, accessed on 15th October 2013.

A report is a systematic, well organised document which defines and analyses a subject or problem, and which may include: the record of a sequence of events; interpretation of the significance of these events or facts; evaluation of the facts or results of research presented; discussion of the outcomes of a decision or course of action; conclusions; recommendations.²

In a law clinic, reports serve the following purposes:

- (a) Give an update to enable the clinic learn about the state, or result of an activity;
- (b) Prepares the clinic adequately for follow-up activities;
- (c) Give an opportunity for the clinic to make an informed decision about a case or an activity or programme or project;
- (d) Enables the clinic to properly advice a client;
- (e) Gives an opportunity for the student to hone writing skills;
- (f) Enables students to reflect and learn from experience;
- (g) Provides a formative assessment opportunity for the clinic to give adequate feedback to students.

9.3 NATURE AND STRUCTURE OF REPORTS- GUIDELINES FOR WRITING

The reason for writing a report will determine the kind of report to write. Most reports expected from law students in a law clinic would be factual reports³, usually on events or activities in which the student has been involved. The activities may include meetings, in the clinic, with clients, with other organisations or

² Birmingham City University δStudy Guides: Writingö, 1.02 *How to write a report*, <http://www.ssdd.bcu.ac.uk/learner/writingguides/1.02%20Reports.htm>, accessed on 15th October 2013.

³ See Birmingham City University δStudy Guides: Writingö, 1.02 *How to write a report*, suggested types of reports which includes factual reports, instructional reports, and leading reports <http://www.ssdd.bcu.ac.uk/learner/writingguides/1.02%20Reports.htm>, accessed on 15th October 2013.

persons connected with some activities of the clinic; interview and counselling of clients; observations of activities like court proceedings, interviewing sessions, meetings, conferences, workshops; site visits; and general updates on the organisation and activities of the law clinic.

It is important to identify the reader of the report before the report is written. In the law clinic, the reader will be the student's supervisor. It is also necessary that the purpose and objective of a report is identified. In the law clinic the purpose and objective of report writing is as shown at paragraph 9.2 above.

Having determined the reason, the kind, the reader, the purpose and objective of the report, it is necessary that the writer abide by certain guidelines on style and structure.

Style

- i. Use simple words;
- ii. Write succinctly;
- iii. Use active rather than passive verbs⁴;
- iv. Proof read and edit the report thoroughly;
- v. Follow the house (particular institution) rules on report writing style.

Structure

- i. Provide a title page, executive summary, and contents page if the report is a long one. If a title page is provided, the title page will normally bear the name of the institution, title of report, date of report, name and designation of the author or admission number if a student;
- ii. If a title page is not used, then the first page of the report

⁴ Birmingham City University Study Guides: Writing, 1.02 *How to write a report*, <http://www.ssdd.bcu.ac.uk/learner/writingguides/1.02%20Reports.htm>, accessed on 15th October 2013.

- should have on top of the page, the name of the Institution, and title of the report;
- iii. The rest of the report would be divide into- Introduction, main body of the report, conclusion/recommendations.

If the purpose of the report is a reflective writing, then the main body of the report should be written as follows⁵:

- 1) Playback: which is a brief description of what happened;
- 2) Analysis: This may include challenges, problems, fears, or apprehension, expectations and how problems or challenges were solved or some ways to avoid recurrence of the challenges/problems;
- 3) Reflection: This shall be on what was good and what was not so good about the activity with specific examples or illustrations. The student may also reflect on his/her emotional reaction to the activity, showing how he/she reacted and why he/she reacted in such way; on the question of whether his/her expectation was met by the actions of everyone involved in the activity under reflection as well as on the question if and how he/she would have gone about the matter differently.

It is important that a report following an activity should be written and submitted immediately the event or activity ends. If this is not done, the writer may find it difficult to write the report later or write an accurate one. If client's problems are involved, delay in writing and submitting reports early may occasion damages and amount to a breach of the Rules of Professional Conduct or other ethical rules.

⁵ See Nigerian Law School Externship Student Handbook, 2013 edition (Ojukwu E, et al, (ed.)), p. 19.

9.4 OPINION WRITING

A written opinion is usually an advice on a matter. Students are usually required to write legal opinion using case studies, or on real cases presented to the clinic.

The purposes for opinion writing in a law clinic are similar to the purposes for report writing in a law clinic.⁶ Specifically, the opinion may be required from the law student to assess and give feedbacks to the student on his/her analytical and writing skill, grammar, and knowledge of the law; for the clinic to make a decision to accept a brief, advise a client, or carry out further activities relating to the case like, interviewing, counselling, drafting and filing of pleadings, motions, amendments and other applications, petitions; activate or prepare for negotiations, arbitrations, mediations, reconciliations; write letters of demand, agreements or any other necessary activity to achieve the client's goals.

As in report writing, it is important to identify the reader of the opinion before it is written. It could be to a client, whether professional or lay and in the case of law clinics, it is usually to the supervisor of the law student.

The guidelines for report writing generally apply to opinion writing with regards to style and structure.⁷

The general structure of a legal opinion should follow this form:

heading and introduction (which should include what the instruction requires); the issues at stake including the basic legal questions posed and brief answer to the question; statement of facts; discussion of the issues (using laws and precedents, analogies); Conclusion which includes what

⁶ See paragraph 9.2, *supra*.

⁷ See paragraph 9.3, *supra*.

likely outcomes you predict in the case if the laws/rules/precedents are applied; and Recommendations which should include your best solution to the problem and any suggested actions that ought to be taken in your opinion.⁸

⁸ See "Legal Writing: Structuring a Better Legal Memorandum or opinion", www.cherylstephens.com/professional/communication/organization.pdf, accessed on 25th November 2012; "BPTC/BVC Opinion Writing" <http://www.lawteacher.net/BPTC-help/BPTC-opinion-writing.php#ixzz211eA2v73>, accessed on 25th November 2012.

CHAPTER 10

File Management

OUTCOMES

- (i) Explain the nature, scope and essentials of file management.
- (ii) Discuss the importance of file management.

10.1 INTRODUCTION

File management and filing has been described as the most important task in any office¹. Proper management of records provides ease of access and it saves time. A well designed and effective filing system is the foundation of a good management programme².

In this chapter we will discuss the nature and scope of file management, essential requirements in file management, opening and maintaining clients' file and closing and retaining clients' file.

10.2 NATURE AND SCOPE OF FILE MANAGEMENT

In a clinic or law office setting, records are in the form of paper, audio visual, electronic media, micro film, etc. However, the most

¹ Boniface, A. and Haupt F. (2004) 'File Management', in Bodenstein, J. et al (eds.), *Clinical Legal Education in South Africa*, Durban (LexisNexis Butterworths)

² Indiana Commission on Public Records, (Records Management Division) 'Files Management Handbook', available at: <http://www.in.gov/icpr/files/filehandbook.pdf>, accessed on 28 February 2012

common record is paper based records. Within a legal context, records serve the following functions:³

- a. They support legal rights and obligations within the legal system.
- b. They provide evidence or proof that a particular activity took place.
- c. They contribute to accountability in organisations and in government.

File management has been described as "a system that provides for procedures for the opening; storage; closing; archiving and retrieval of files"⁴. File management is an integral part of record management. Record management is described as the application of systematic control to recorded information. It is a logical and practical approach to the creation, maintenance, use and disposition of records and therefore to the information that those records contain.⁵

It is important to note clients in a law clinic could either be in the form of the indigent members of the society who could not afford the payment of legal services or it could be in a form of prisoners or pre-trial detainees. Whatever the category of clients the law clinic is dealing with, record keeping is very important it should also be emphasized that it is not only the record keeping that is important, but also where it is kept; so that it is protected and retrieved easily.

³ Roper, M. et al (eds), (1999) *Managing Public Sector Records: A Study Programme*, London, International Records Management Trust,

⁴ Spagenberg, (2002) *Practical Legal Training Manual: Business Management*, Cited in. Bodenstein J. et al (eds). (2004) "File Management", in *Clinical Legal Education in South Africa*, Durban (LexisNexis Butterworths, op.cit

⁵ Why Files Management? Available at: <http://f2.washington.edu/fm/recmgt/filesmanagement/why>, accessed on 18 February 2012

10.3 TYPES OF FILING SYSTEM

Each law office or law clinic maintains a particular type of convenient filing system. However, there are certain types of filing system that can be described as common in most law offices and law clinics. These include:

a. Alphabetical

The most commonly used filing arrangement is the alphabetical filing method. This is where case files are arranged in alphabetical order according to the client's name. The alphabetical arrangement is commonly used for correspondence. As long as the name is known, any authorized person can have direct access to the file without an index. Retrieval and reference are rapid when all requests for information are made by name. Alphabetical filing systems are very flexible.⁶ The disadvantage of alphabetical filing system is the likelihood of confusion when more than one client has the same surname⁷

b. Numerical

Numeric filing is the filing of numbered documents in a numerical sequence order starting from the first number and proceeding to the highest numbered file (last or most recent). In a numeric system of filing, each file is classified by number rather than name. When using numeric filing system, there is no need to train personnel, because it is easy to find files which are numbered from the lowest through the highest number.

c. Alpha-Numeric file (Combination of a and b above)

Alpha-numeric filing is simply the filing of letters and numbers in a format that suits the file situation. Alpha-numeric filings are

⁶ Indiana Commission on Public Records, (Records Management Division) *Files Management Handbook*, op cit.

⁷ Boniface A. and Haupt, F. (2004) *File Management*, in Bodenstein J. et al (Eds.). *Clinical Legal Education in South Africa*, op. cit.

divided into two types; subject files and name files.⁸ Subject files follow an encyclopaedic arrangement with numeric coding of records and folders. Name files are usually filed alphabetically with names arranged in sequence according to exact spelling, and are dependent on the accurate interpretation of the spoken or handwritten.⁹

d. Other Filing Systems

Other filing systems include colour coding, geographical classification, subject based, bar coding, etc. These systems of filing may be used alone or in combination with any of the earlier mentioned filing systems.

Whatever filing system one decides to adopt in the law office or the law clinic, should make provision for the opening of the files, storage of files, diarizing of files the regulation of flow of files in the office; and the closing of files.

10.4 ESSENTIAL REQUIREMENTS OF FILE MANAGEMENT

When choosing the type of filing system to be adopted as well as equipment to be used for filing by a clinic or a law office, it is important to take into consideration functionality or accessibility, flexibility, practicability, standardization, simplicity of use as well as cost¹⁰.

A good filing system should allow for easy identification of documents, quick filing and retrieval of files or documents; provide for a simple and unambiguous file categorization /classification, give room for future expansion and make provision

⁸ Indiana Commission on Public Records, (Records Management Division) *Files Management Handbook*, op cit.

⁹ Ibid.

¹⁰ Ibid.

for adequate security for files or documents. These essentials are discussed below:

Functionality or Accessibility – In selecting a filing equipment to be used for a law clinic or office, it should provide quick and easy access to records. Since records are filed for future reference, easy retrieval of the information by several people at the same time or at different occasions should be the most important consideration.

Security - Filing equipment should have locks and the area should also be secured so that only authorized persons should have access.

Minimum space utilization and mobility - Filing equipment should occupy minimum office space, and capable of being moved around in case of relocation of an office.

Cost – Apart from functionality and security of filing equipment, cost of equipment as well as cost of maintaining such equipment should be taken into consideration in selecting filing equipment.

10.5 OPENING AND MAINTAINING CLIENT’S FILE

A law clinic should normally have a written procedure for opening a file for each client. It may be after due consultation and approval of a clinic director or supervising Attorney. To organize records systematically,¹¹ there are numerous tools used in the filing process. These filing tools include:

a). Application form: It is also referred to as the opening sheet or mandate form. It contains information such as client’s name, residential and office address, telephone and fax numbers, email address, occupation, type of case, name of opposing attorney, date file opened, date of first consultation etc.¹²

¹¹Indiana Commission on Public Records, (Records Management Division) “*Files Management Handbook*”, op cit..

¹² Boniface A. and Haupt F. (2004) “*File Management*” op.cit.

b). Indemnity Agreement form: An indemnity agreement entered between two parties requires one party to protect another party against anticipated losses, claims, or lawsuits that may occur in the future. This document will outline this understanding between the parties and will also lay out the various basic terms of the indemnification such as exempting the law clinic from any future claims and lawsuits or any liability arising from the legal consultation or advice rendered.

c). Front cover of a File:Front cover of a file must contain information such as Client's Name, residential and office address, telephone and fax numbers, email address, file reference number, name of clinician dealing with the matter and space for diarised dates etc.¹³ All these should be written very clearly on the file.

d). Sub Files or Labels

Labels provide identification for guides and folders and identify the contents of the records. Guide labels identify the records filed in a specific section of the file. Guide labels denote where each section of the file begins and ends.¹⁴ For instance, separate sub file or label should be used for application form, correspondence, pleadings, documentary evidence etc.¹⁵

e). Note sheet: Also referred to as counter page or a file update sheet, it should be in every case file, it may be in a printed form, or a piece of lined paper; it is used in recording all that transpired on the file. These include telephone calls made and received, mails or correspondences sent or received, research done, expenses incurred etc. The importance of note sheet in a file is to enable anyone looking at it to be able to appreciate exactly what is going on in the case file.

¹³ Ibid.

¹⁴ Indiana Commission on Public Records, (Records Management Division) "Files Management Handbook", op cit.

¹⁵ Boniface A. and Haupt F. (2004) "File Management" op.cit.

10.6 BENEFITS OF MAINTAINING A GOOD FILE MANAGEMENT

The benefits of maintaining a good file management include:

- i. Protection of documents and maintaining confidentiality
- ii. Easy filing and retrieval as well as adaptability of system by existing and new office staff Improved service delivery to clients

The basic objective of a good filing system is to be able to find the record you need quickly and economically, regardless of its format. The goal of a good filing system is to provide quick access to information.¹⁶

10.7 CLOSING AND RETAINING CLIENT'S FILES

As indicated earlier, before a client's file is closed the clinician must seek and obtain the permission of a clinic coordinator or any of his supervisors. The client must be informed in writing that his file will be closed. A note of close as well as the date of closure of a client file must be indicated on the file.¹⁷ A closed file must be kept in a safe and easily accessible place in the event that the client may request for copies of document in that file. In such circumstances, the clinic is under obligation to avail him copies of such documents.

10.8 CONCLUSION

In any organization proper record management as well as easy retrieval of these records is very important. This is so because availability of records is very important in attaining any organizational goal especially in a law clinic where clients rely so much on the expertise of the clinician in asserting their rights or

¹⁶ Why Files Management? Op.cit

¹⁷ Boniface A. and Haupt F. (2004) "File Management", op.cit.

privileges. The need for proper record and easy access of such records cannot be over emphasized.

There is the need for shift from the conventional record keeping of papers and documents in a file to a modern method of digital record keeping. McDonald is of the view that: "in developing record keeping solutions, it is necessary to understand the evolution that is taking place in the use of technology."¹⁸

The use of information and communication technology in the management of clients records in law offices and law clinics is an idea that is long overdue.

¹⁸ McDonald I. (1995), "Managing Records in the modern Office: Taming the Wild Frontier" *Archivaria* 39 (Spring) 70-9

INDEX

A

Access to justice, 121
Acquittal, 82
Administration of Criminal
Justice Law of Lagos State,
33
Administration of Justice
Commission Act, 25
Advanced Fee Fraud and
other Related Offences Act,
17
Advisory Council on
Prerogative of Mercy, 23
African Charter on Human
and Peoples Rights, 24, 109
Armed Forces, 15
Arraignment, 38,53, 58
Arrest, 32, 33
Attorney-General, 19, 165

B

Bail, 64, 65, 66, 69, 165
Banks and other Financial
Institutions Act, 17
Borstal Institutions and
Remand Centres Act, 18

C

Charge, 38,41
Chief Judge, 21, 165
Child Rights Act, 19, 27
Children and Young Persons
Law, 27
Client counselling, 203, 204
Client interview, 200, 201,
202, 204
Code of Conduct Bureau and
Tribunal Act, 22
Code of Conduct Tribunal,
22
Commencement of criminal
proceeding in Magistrate
courts, Area Courts and

- Customary Courts in the Northern States, 4345,46
- Commencement of criminal proceedings in Magistrate courts in the Southern States, 41, 42
- Confidentiality, 183
- Conflict of interest, 189
- Constitution, 7, 8, 9, 10, 25, 139
- Convention against torture, (CAT), 106
- Corrupt Practices and Other Related Offences Act, 15
- Corruption, 128
- Counselling, 199
- Court of Appeal Act, 139
- Court ordered pre-trial detention, 62
- Courts, 20
- Criminal Code, 33
- Criminal Procedure Act, 8, 25, 33, 139
- Criminal Procedure Code, 25, 139
- Custom and Excise Management Act, 12
- Customs and Excise Dumped and Subsidized Goods) Act, 12
- Customs and Excise Management (Disposal of Goods) Act, 12
- Customs and Excise Special Panel and other Provisions, 12
- D**
- Director of Public Prosecution, 19, 165
- Discharge, 82
- E**
- Economic and Financial Crimes Commission Act (EFCC), 16
- Economic and Financial Crimes Commission, 16
- Ethical dilemmas, 190
- Ethics, 178

F

Federal Road Safety
Commission Act, 13

Federal Road Safety
Commission, 13

File management, 213

H

Holding charge, 54, 58

Human Rights, 85, 86, 90,
92, 106

I

Immigration Act, 13

Immigration Officers, 13

Imprisonment, 80

Independent Corrupt
Practices and other Related
Offences Commission, 15

Instituting criminal
proceedings, Anambra State,
52

Instituting criminal
proceedings, Federal High
Court, 50

Instituting criminal
proceedings, Lagos State, 51

Institution of criminal
proceedings, High Courts, 46,
48, 49, 50

Institutions involved in the
Nigerian criminal justice
system, 7

International Convention on
Elimination of All Forms of
Racial Discrimination, 24

International Covenant on
civil and political rights
(ICCPR), 107

Interviewing, 199

Investigation, 31

J

Jail delivery, 162

Judges Rules, 9

Juveniles, 115

L

Law Clinic, 1, 118, 153, 199

Legal Aid Act, 23, 139, 141

Legal Aid Council, 23, 165

Legal aid, 129, 139

M

Magistrates Court Rules, 26

- Ministry of Justice, 19
- Money Laundering Prohibition Act, 17
- N**
- National Drug Law Enforcement Agency of Nigeria Act (NDLEA), 17
- National Drug Law Enforcement Agency, 17
- National Human Rights Commission Act, 24
- National Human Rights Commission of Nigeria, 23, 166
- National Security Agencies Act, 14
- Nature, scope and concept of Nigerian criminal justice system, 4
- NGOs, 166
- Nigeria Pre-Shipment Inspection Act, 12
- Nigeria Security and Defence Corps Act, 13
- Nigerian Criminal Justice System, 3
- Nigerian Customs Service, 12
- Nigerian Security and Civil Defence Corps Act, 13
- O**
- Objectives and Scope of a
- P**
- Prison Pre-trial Detainee Law Clinic, 1
- Police Act, 7, 8, 9
- Police detention (pre-trial), 36
- Police Service Commission, 10
- Police, 7, 10, 11, 65, 136
- Pre-trial detainee, 89, 90, 92
- Prison Act, 17, 19
- Prison Service, 17
- Prisoner, 88, 90, 92, 106, 109, 112, 116, 117
- Procedure for Instituting Criminal Proceedings, 30
- Professional responsibility, 177

Prosecution, 72

Report and opinion writing,
207

R

Right to be presumed
innocent, 100

Right to defend self or by
counsel, 103

Right to dignity, 94

Right to freedom from
discrimination, 98

Right to freedom of
expression, 98

Right to Freedom of thought,
conscience and religion, 97

Right to prepare for defence,
102

Right to remain silent, 100

Role of Law Clinics, 153

Rules of conduct, 192

S

Sheriffs and Civil Process
Act, 13

Sheriffs, 13

Stages of criminal process for
offences with capital
punishment, 83
Supreme Court Act, 139

T

Trafficking, 185

U

United Nations Standard
Minimum Rules (SMR) for
the Treatment of Prisoners,
110

Universal Declaration on
Human Rights, 108

V

Vienna Declaration on
Human Rights, 23, 24